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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 136.

EDWARD BURGESS, PLAINTIFF IN ERROR,

vs.

JESSE SELIGMAN, JAMES SELIGMAN, AND DAVID J. SELIGMAN, EXECUTORS OF JOSEPH SELIGMAN, DECEASED.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

FILED NOVEMBER 3, 1879.

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1 THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judge of the circuit court of the United States for the eastern district of Missouri, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court before you, at the March term, 1879, thereof, between Edward Burgess, plaintiff, and Joseph Seligman, defendant, a manifest error hath happened, to the great damage of the said plaintiff, as by his complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 31st day of May, in the year of our Lord one thousand eight hundred and seventy-nine.

Issued at office in the city of St. Louis, with the seal of the circuit court of the United States for the eastern district of Missouri, dated as aforesaid.

[SEAL.] M. M. PRICE,
Clerk Circuit Court United States, Eastern District of Missouri,
By A. P. SELBY,
Deputy.

Allowed by—

JOHN F. DILLON, *Judge.*

1½ *Return to writ.*

UNITED STATES OF AMERICA,
Eastern District of Missouri, ss:

In obedience to the command of the within writ, I herewith transmit to the Supreme Court *Court* of the United States a duly certified transcript of the *the* record and proceedings in the within entitled case, with all things concerning the same.

In witness whereof I hereto subscribe my name, and affix the seal of said circuit court, at office in the city of St. Louis, this 25' day of October, A. D. 1879.

[SEAL.] M. M. PRICE,
Clerk of said court,
By A. P. SELBY,
Deputy.

(Indorsed:) No. 1336. United States circuit court, eastern district of

Missouri. Edward Burgess vs. Joseph Seligman. Writ of error to the circuit court of the U. S. for the east. dist. of Missouri. Returned and filed day of 187 . clerk.

2 The United States of America to Joseph Seligman, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington, on the second Monday of October next, pursuant to a writ of error, filed in the clerk's office of the circuit court of the United States for the eastern district of Missouri, wherein Edward Burgess is plaintiff in error and you are defendant in error, to show cause if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable John F. Dillon, judge of the circuit court of the United States for the eastern district of Missouri, this 31st day of May, in the year of our Lord one thousand eight hundred and seventy-nine.

JOHN F. DILLON,
Judge United States Circuit Court, Eastern District Missouri.

(Indorsed:) 1336. United States circuit court, eastern district of Missouri. Edward Burgess vs. Joseph Seligman.

Service of within citation waived.

H. H. HARDING,
Att'y for Def't.

Citation. Filed May 31, 1879. M. M. Price, clerk.

3 UNITED STATES OF AMERICA,
Eastern District of Missouri, ss:

In the circuit court of the United States in and for said eastern district.

Be it remembered, that on the sixteenth day of September, A. D. 1878, at a regular stated term of the circuit court of the United States in and for the eastern district of Missouri, begun and held at the city of St. Louis, in said district, on said last-named day, the following, among other proceedings were had, and appear of record in said court, to wit:

EDWARD BURGESS, PLAINTIFF,
vs.
JOSEPH SELIGMAN ET AL., DEFENDANTS. } 1336.

4 Now comes the plaintiff, by his attorneys, and files his amended petition by leave of court.

Said amended petition being in the words and figures following, to wit:

In the circuit court of the United States for the eastern district of Missouri.

EDWARD BURGESS, PLAINTIFF,
vs.
JOSEPH SELIGMAN, JAMES SELIGMAN, AND Jesse Seligman, defendants.

Plaintiff for amended petition states:

I. That he is a resident of the county of St. Louis, and State of Mis-

souri; that the defendants are non-residents of said State, and at the dates hereinafter mentioned and now, they were and are doing business as a co-partnership under the firm name of J. & W. Seligman & Co.

5 II. That heretofore, to wit, on the fifth day of November, A. D. 1874, and for a long time previous thereto, the Memphis, Carthage and Northwestern Railroad Company was a railroad corporation organized and existing under the general laws of the States of Missouri and Kansas.

III. That on said last-named day judgment was rendered in favor of this plaintiff and against said corporation, by the district court in and for the county of Cherokee, eleventh judicial district, State of Kansas, for a large sum of money, to wit, the sum of seventy-three thousand six hundred and sixty-one dollars ($73,661.00), together with his costs therein taxed at $15.50.

And plaintiff states that said court then and there had full and complete jurisdiction of the subject-matter of said judgment and of the said parties thereto.

That plaintiff still is the owner of said judgment, no part of which has ever been collected or paid.

IV. That afterwards, to wit, on the first of December, A. D. 1874, said railroad corporation was dissolved, leaving the judgment aforesaid unpaid.

V. That the capital stock of said corporation consisted of one hundred thousand shares of one hundred dollars each; that the defendants, in their firm-name aforesaid, were, at the date of said dissolution and of said judgment, and still are, stockholders of said capital stock, then and still holding sixty thousand of the shares of said stock, of the nominal value of $6,000,000.00; that at the date of said dissolution and judgment, and now, there is due and unpaid on said stock, so held by the defendants, the amount and sum of one million dollars.

Wherefore, plaintiff asks judgment against the defendants in the sum of seventy-three thousand six hundred and sixty-one dollars, with the costs of said judgment, and interest on the amount of said judgment, at the rate of seven per cent. per annum, as provided by the laws of the State of Kansas, together with the costs of this suit.

JOHN P. ELLIS,
Attorney for Plaintiff.

6 And afterwards, to wit, on the 17th day of September, A. D. 1878, at said term of court, the following further proceedings were had and appear of record in said cause, to wit:

EDWARD BURGESS, PLAINTIFF,
vs.
JOSEPH SELIGMAN ET AL., DEFENDANTS. } 1336.

Now come the defendants, by their attorneys, and file answer to amended petition herein.

Said answer being in words and figures following, to wit:

7 In the circuit court of the United States, eastern district of Missouri, ss.

EDWARD BURGESS, PLAINTIFF,
vs.
JOSEPH SELIGMAN, JAMES SELIGMAN, AND Jesse Seligman, defendants.
} Removed from St. Louis circuit court.

Answer of defendants.

Defendant, Joseph Seligman, for answer to the amended petition in the above-titled cause, says that as to whether plaintiff obtained judgment as averred against the Memphis, Carthage and Northwestern Railroad Company, or as to whether said judgment remains unpaid, he has no knowledge nor information thereof sufficient to enable him to form a belief, and he denies the truth of said averments. And defendent denies that said corporation was dissolved as averred.

And for further answer, this defendant denies that the defendants named in this suit were in their firm name, or that either of them was at the date of the dissolution of said corporation or at the date of said judgment referred to, or that they in their firm name, or that either of them now is stockholder or stockholders of the capital stock thereof, hold ng 60,000 shares or any number of shares. And for further answer this defendant says that in truth and in fact he never was nor was the firm of J.
8 & W. Seligman & Co. the owner or holder of any stock in said corporation, except as hereinafter stated.

He says that in the year 1872 said corporation issued certain bonds to the amount of about eight hundred thousand dollars, which bonds were secured by a deed of trust on all the property of said corporation; that the firm of J. & W. Seligman & Co., of New York, were made the financial agents of said corporation to negotiate and sell said bonds in the market; that this defendant was a member of said firm; that one of the members of said firm, to wit, Jesse Seligman, was made one of the trustees in said deed of trust; that said bonds were negotiated and sold; that the said firm of J. & W. Seligman & Co. made large advances on said bonds, and became holders of the same to the amount of over four hundred thousand dollars; that all the property of said corporation, including its railroad, rolling-stock, earnings, and income, were pledges by said deed of trust to the payment of said bonds and the interest thereon; that the capital stock of said corporation was ten millions of dollars, and that six millions of said stock was deposited with said firm of J. & W. Seligman & Co., on trust as security for the payment of said bonds, to be held by said firm for the purpose of enabling it to control said corporation and to see that its affairs were honestly conducted and the earnings applied to the payment of the bonds, and the interest thereon, in order that the interests of the said firm might be protected and the payment of their bonds secured, and for no other purpose, said stock being the property of said corporation, to be returned to it, and was only held in trust and as additional security for the payment of said bonds, and for no other purpose; and defendant says he never subscribed for, bought, or held any of the stock of said corporation except as above stated, nor did the firm of J. & W. Seligman & Co. ever subscribe for, buy, or hold any of said stock except as above stated.

Wherefore defendant says he is not liable as stockholder of said corporation, and he asks to be hence dismissed with his costs.

BROADHEAD & HARDING,
Attorneys for Defendant.

9 And afterwards, to wit, on the 21st day of September, A. D. 1878, at said term of court, the following further proceedings were had, and appear of record in said cause, to wit:

EDWARD BURGESS, PLAINTIFF,
vs. } 1336.
JOSEPH SELIGMAN, DEFENDANT.

Now comes the plaintiff, by his attorney, and files replication, said replication being in words and figures following, to wit:

10 In the circuit court of the United States, eastern district of Missouri.

EDWARD BURGESS, PLAINTIFF,
vs.
JOSEPH SELIGMAN, JAMES SELIGMAN, AND Jesse Seligman, defendants.

Reply.

Now comes the plaintiff, and for reply to the answer of Joseph Seligman, denies each and every averment therein, except as hereinafter expressly admitted. Plaintiff admits that the railroad corporation in the said answer referred to did issue its certain bonds to the amount of about eight hundred thousand dollars, which bonds were secured by a deed of trust on all the property of said corporation; that the firm of J. & W. Seligman & Co. were made the financial agents of said corporation; that one of the members of said firm, to wit, Jesse Seligman, was made a trustee in said deed of trust; that said bonds were negotiated and sold to the amount of over four hundred thousand dollars, which were purchased by said firm of J. & W. Seligman & Co.

Plaintiff admits that the capital stock of said corporation was ten millions of dollars.

Plaintiff denies that six millions of said stock were deposited with said firm in the manner and for the purpose averred in the answer, but admits that the same was to be held for the purpose of enabling said firm to control said corporation, and that defendant, Joseph Seligman, was a member of said firm.

JOHN P. ELLIS,
Attorney for Plaintiff.

11 And afterwards, to wit, on the second day of April, A. D. 1879, at a regular stated term of the circuit court of the United States in and for the eastern district of Missouri, begun and held at the city of St. Louis, in said district, on Monday, March 17, A. D. 1879, the following further proceedings were had, and appear of record in said cause, to wit:

EDWARD BURGESS, PLAINTIFF,
vs.
JOSEPH SELIGMAN, DEFENDANT. } 1336.

Now come the parties, by their attorneys, and file stipulation waiv-
12 ing a jury herein; said stipulation waiving a jury being in words and figures following, to wit:

EDWARD BURGESS, PLAINTIFF,
vs.
JOSEPH SELIGMAN, DEFENDANT.

Jury waived, and case set down for trial April 11th, 1879.

BROADHEAD, SLAYBACK & HAUESSLER,
Att'ys for Defendant.

JOHN P. ELLIS, *Attorney for Plaintiff.*

And afterwards, to wit, on the eleventh day of April, A. D. 1879, at said term of court, the following further proceedings were had, and appear of record in said cause, to wit:

13 EDWARD BURGESS, PLAINTIFF,
vs.
JOSEPH SELIGMAN, DEFENDANT.

Now come the parties, by their attorneys, the plaintiff by John P. Ellis, esquire, and the defendant by James O. Broadhead, esquire, and this case being regularly called for trial, and both parties being ready, the same is now submitted to the court without the intervention of a jury, upon the pleadings, proofs, and arguments of counsel; but the court, not being fully advised as to what judgment to render in the premises, takes further time to consider thereof.

14 And afterwards, to wit, on the 28th day of April, A. D. 1879, at said term of court, the following further proceedings were had, and appear of record in said court, to wit:

15 In the circuit court of the United States for the eastern district of Mo.

EDWARD BURGESS
vs.
JOSEPH SELIGMAN.

Now, on this 26th day of April, 1879, the above-entitled cause coming on for trial, a jury having been waived, the cause being tried by the court, the following facts were by the court found from the evidence in the case:

I. The Memphis, Carthage & Northwestern Railroad Company
16 was a corporation organized under the general laws of Missouri, with an authorized capital stock of ten million dollars.

II. On the 14th day of March, 1872, the following contract in writing

was entered into between the R. R. Co. and the firm of J. & W. Seligman & Co., of the city of New York (of which defendant was and still is a member). These articles of agreement made and concluded on this
14th day of March, A. D. 1872, between the Memphis, Carthage
17 and Northwestern Railroad Company of Missouri and Kansas, as
party of the first part, and Messrs. J. & W. Seligman & Co., of the city of New York, as party of the second part, witnesseth that:

Whereas in the States of Missouri and Kansas certain municipalities and township' have made subscriptions to the capital stock of the party of the first part for the purpose of aiding in the construction of the Memphis, Carthage and Northwestern Railroad from the intersection
18 with the Atlantic and Pacific Railroad at Pierce City, in the county
of Lawrence and State of Missouri, and from thence northwesterly to Carthage, in the county of Jasper, in the same State, and thence westerly to Columbus, Oswego, and Independence, in the counties of Cherokee, Labette, and Montgomery, in the State of Kansas; and whereas the party of the first part agrees that at this date said subscriptions are as follows, to wit:

Pierce City, Lawrence County, Mo	$50,000
Sarcoxie, Jasper Co., Mo	$40,000
19 Marion, Jasper Co., Mo	$125,000
Mineral, Jasper Co., Mo	$30,000
	$245,000
Am't forward	$245,000
Spring Valley, Jasper Co., Mo	$30,000
Shawnee, Cherokee Co., Kansas	$25,000
Crawford, Cherokee Co., Kansas	$25,000
Salamance, Cherokee Co., Kansas	$75,000
Lola, Cherokee Co., Kansas	$25,000
Oswego, Labette Co., Kansas	$80,000
Making a total of	$505,000

And that additional subscriptions thereto were in all probability made on the 7th inst., as follows:

Liberty, Montgomery Co., Kansas	$40,000
Independence, Montgomery Co., Kansas	$100,000
Making additional	$140,000

20 And of total subscriptions, actual and probable, the sums of six hundred and forty-five thousand dollars ($645,000) in the bonds of said municipalities and township; and whereas that portion of the said Memphis, Carthage and Northwestern Railroad, between Pierce City and Carthage, a distance of twenty-seven (27) miles, has been graded, bridged, tied, and the right of way therefor obtained, and all paid for by the party of the first part from the proceeds of the subscriptions hereinbefore named; and whereas the party of the first now seeks additional capital for the purpose of procuring the iron and equipments for said railroad by the sale of its first-mortgage bonds, it is hereby agreed between the parties hereto as follows:

21 First. The party of the first part agree to furnish the capital sufficient to completely prepare its said line of road for the iron, including graduation, bridging, culverts, ties, and right of way, and will place in the hands of counsel, to be selected by the party of the second part, all the necessary papers and other legal evidence, to secure from said counsel his approval and certificate of the validity of the first-mortgage bonds of said company, which said bond is to be a seven per cent. gold bond, free of tax, to run thirty years, and not to exceed seventeen thousand dollars ($17,000) per mile.

Second. The party of the first part, in consideration of the advances hereinafter mentioned, made and to be made by the party of the second part, agrees to execute and deposit with the party of the second
22 part their entire issue of said first-mortgage bonds, to wit, five millions of dollars $5,000,000), and also agrees to deposit with the party of the second part a majority of the capital stock authorized to be issued, said stock to remain in the control of said party of the second part for the term of one year at least.

Third. The party of the second part agree to purchase two thousand *tons* (2,000) tons of railroad iron, under the direction of the party of the first part, and from time to time to make such advances of cash during the completion of the road to Carthage as shall not, together with the same paid for railroad iron as aforesaid, exceed the sum of two hundred thousand ($200,000), it being expressly understood and agreed upon that for all such advances, or at any other time made, the party of the
23 second part shall receive interest at the rate of seven per cent. per annum until reimbursed by the sale of the bonds.

Fourth. The party of the first part hereby grants to the party of the second part, for the term of twelve months from this date, the privilege to call any portion of said five millions of first-mortgage bonds, at the rate of seventy cents currency and accrued interest, less two and one-half ($2\frac{1}{2}$) per cent., and in case a larger amount of bonds should be sold than will be needed for ironing the road, then the party of the second part shall advance funds for the purchase of rolling stock ($2,000) per mile, and the balance shall remain on deposit with the party of the second part at the rate of interest ruling in New York on call loans, and to be used for the purpose of paying any deficiency in net earnings of said road to meet demands for interest on said mortgage bonds.

Fifth. In the event that by some cause unforeseen the party of the
24 second part shall not succeed in the negotiations of said bonds, or any part of them, during the next twelve months, the party of the first part agrees to repay all sums of money advanced by the party of the second part, with interest at the rate of seven per cent. per annum, and in addition thereto a commission of two and one-half ($2\frac{1}{2}$) per cent. on all bonds returned by the party of the second part to the party of the first part.

In witness whereof the parties hereto have set their hands and seals the day and year first written.

MEMPHIS, CARTHAGE AND NORTHWESTERN RAILROAD COMPANY,
(Signed) By L. P. CUNNINGHAM, *President.*
(Signed) " J. & W. SELIGMAN & CO.

In presence of—
(Signed) CLINTON B. FISK.

25 III. On the 1st day of May, 1872, pursuant to a resolution of the board of directors duly passed to borrow money and mortgage the property of the company, a trust-deed of the railroad and all its appurtenances and incomes, to secure the payment of the first-mortgage bonds and the interest thereon, was executed by the railroad company to Jesse Seligman and John H. Stewart, trustees, the former then and still being a member of the firm aforesaid.

Said deed of trust is in the usual form of a railway mortgage.

IV. At a meeting of the directors of the Memphis, Carthage and Northwestern Railroad Company, duly called and held at the office of the company in Carthage, Missouri, on the eleventh day of May, A. D. 1872, the following proceedings were had: It is ordered by the board of
26 directors that in making negotiations for money with J. & W. Seligman & Co. that certificates for a majority of the capital stock of this company be issued to said J. & W. Seligman & Co. to hold in trust for the period of twelve months, and that such certificates be signed by the president and secretary, with the corporate seal of this company affixed.

J. E. Brown, secretary of the Memphis, Carthage & Northwestern Railroad Company, do hereby certify that the above and foregoing is a true copy of an order and resolution made and passed by the board of directors of said company at a meeting duly called and held on the eleventh day of May, A. D. 1872.

In testimony whereof I have hereunto set my hand and affixed the corporate seal of said company, at office, Carthage, Missouri, on this 22nd day of May, A. D. 1872.

[L. S.] E. H. BROWN, *Secretary.*

27 V. On the 28th day of the same month a certificate of stock for $6,000,000, being a majority of the capital stock, was issued and delivered to J. & W. Seligman & Co., in words and figures following:

Number 1.] [60,000 shares.

MEMPHIS, CARTHAGE AND NORTHWESTERN RAILROAD CO.

This is to certify that J. & W. Seligman & Co. are entitled to sixty thousand shares, of one hundred dollars each, of the capital stock of the Memphis, Carthage & Northwestern Railroad Co., transferable only on the books of the company, in person or by attorney, on the surrender of this certificate.

28 In witness whereof the said company have caused this certificate to be signed by their president and secretary this 28th day of May, 1872.

[U. S. int. rev. stamp.]

L. P. CUNNINGHAM, *President.*

E. H. BROWN, *Secretary.*

VI. This certificate is produced in evidence from the possession of Joseph Seligman, the defendant; the defendant or J. & W. Seligman & Co. never subscribed for the stock nor agreed to do so, and obtained the same only in the manner herein set forth.

29 VII. The stock-book in which a list of stockholders is required to be kept by sub. viii, of sec. 6, 1st Wag. St., p. 300, is as follows:

We, L. P. Cunningham, president of the Memphis, Carthage and Northwestern Railroad Company, and E. H. Brown, secretary of the Memphis, Carthage and Northwestern Railroad Company, do hereby certify that this is the only record of the list of stockholders of the Memphis, Carthage and Northwestern Railroad Company, and do further certify that the names which may have appeared on pages from one (1) to twelve (12), inclusive, as stockholders, never did themselves, by attorney or agent, ever pay in any subscriptions, excepting the names of such persons as appeared in the charter of said company. We do further certify that the
30 aforementioned pages, from one (1) to twelve (12), inclusive, were cut from this book and destroyed, as of no importance and not constituting a part of the records of the company.

E. H. BROWN, *Secretary.*
L. P. CUNNINGHAM,
President.

Carthage, Mo., March 4th, 1873.
In presence of—
J. H. HARDIN.
Pierce Township, Lawrence Co., Mo.
Sarcoxie Township, Jasper Co., Mo.
Sarcoxie Town., Jasper Co., Mo.
Marion Township, Jasper Co., Mo.
Salamanca, Cherokee Co., Kansas.
J. & W. Seligman, New York, N. Y.
L. P. Cunningham, Carthage, Mo.
G. P. Cunningham, Carthage, Mo.
E. H. Brown, Carthage, Mo.
G. S. Cassie, Carthage, Mo.
Charles Marquis, Sarcoxie, Mo.
R. W. Right, Oswego, Kansas.
D. H. Budlong, Carthage, Mo.
31 Ezra Miller, Carthage, Mo.
L. L. L. Allen, Pierce City, Mo.
Clinton B. Fisk, St. Louis, Mo.
Timothy Ryan, Carthage, Mo.
W. S. Tower, Carthage, Mo.

E. H. BROWN,
Secretary.

This book contains no statement as to the amount of stock held by any of the stockholders.

VIII. The following is a transcript of the stock transfer-book required to be kept by the statutes of Missouri:

32 Names.	Residence.	Date.	No. of shares	Amount in dollars.
Pierce Township...	Lawrence Co., Mo	Dec. 20, 1872.	500, five hundred.....	50,000, fifty thousand.
Sarcoxie Township.	Jasper Co, Mo....	Dec. 20, 1872	400, four hundred.....	40,000, forty thousand.
Sarcoxie Town...	Jasper Co., Mo...	Dec. 20, 1872	50, fifty	5,000, five thousand.
Marion Township..	Jasper Co., Mo...	Dec. 20, 1872.	1,000, one thousand...	100,000, one hundred thousand.
Salaman Township.	Cherokee Co., Kas	Dec. 20, 1872.	750, seven hundred and fifty.	75,000, seventy-five thousand.
J. & W. Seligman..	New York, N. Y ..	Dec. 20, 1872.	60,000, sixty thousand (held in escrow).	6,000,000, six millions.
L. P. Cunningham	Carthage, Mo.....	Dec. 20, 1872	1, one.....	100, one hundred.
G. P. Cunningham.	Carthage, Mo.....	Dec. 20, 1872.	1, one.....	100, one hundred.
E. H. Brown	Carthage, Mo....	Dec. 20, 1872.	1, one.	100, one hundred.
G. A. Cassel.....	Carthage, Mo....	Dec. 20, 1872.	1, one..... ..	100, one hundred.
Chs. Marquis.....	Carthage, Mo....	Dec. 20, 1872.	1, one	100, one hundred.
R. W. Wright.....	Oswego, Kas	Dec. 20, 1872	1, one.....	100, one hundred.
D. H. Budloug.....	Carthage, Mo	Dec. 20, 1872.	1, one....	100, one hundred.
Ezra Miller.....	Carthage, Mo.....	Dec. 20, 1872	1, one.....	100, one hundred.
L. L. L. Allan	Pierce City, Mo ..	Dec. 20, 1872	1. one.....	100, one hundred.
Clinton B. Fisk ..	St. Louis, Mo.....	Dec. 20, 1872.	1 one.....	100, one hundred.
Timothy Ryan.....	Carthage, Mo....	Dec. 20, 1872.	1, one.....	100, one hundred.
W. S. Tower.....	Carthage, Mo.....	Dec. 20, 1872.	1. one.....	100, one hundred.
J. P. Boyd	Sarcoxie, Mo.....	Dec. 20, 1872.	1, one	100, one hundred.
H. G. Webb.....	Oswego, Kas.....	Dec. 20, 1872.	1. one.	100, one hundred.

E. H. BROWN, *Secretary.*

No other entries in said stock transfer-book were ever made.

33 IX. Shortly after the execution of the contract of March 14th, 1872, Joseph Shippen, an attorney, of St. Louis, saw and examined its provisions, and a few days thereafter told Burgess of the contract, and that thereby the Seligmans were to have control of the road and of the stock and bonds, and told Burgess it would be well for him to have a talk with Joseph Seligman before entering into contract with the R. R. for its construction.

Before June 14th, 1872, when the contract for construction was entered into between Burgess and the R. R. co., he, learning that Joseph Seligman was in St. Louis, called on him, and stating that he un-
34 derstood that he (Seligman), was interested in the road, asked his advice about taking a contract for construction with the company.

Whereupon the following conversation ensued (as warranted by Burgess):

"I told him I had been constructing on that Carthage road, and that I understood he was interested in the road now, and I would like to talk to him on that matter; that this company owed me—or Cunningham, who was president of the corporation—that he owed me then some money for work I had done between there and Pierce City, and I wanted to know what the prospect was for pushing the work forward, the
35 means of getting the iron, and so on, and he said, 'I think the best thing you can do is to go on with the work westward, and we will have ample means to get hold of the local bonds.'

"It seems Cunningham had represented to him that there was local means enough to grade the road, and he suggested to me then that I would be safe in going on and entering into such a contract, and then he mentioned that he thought it would be better for all parties if the road was built and the work prosecuted westward."

XI. On June 14th, 1872, Burgess entered into a contract with
36 the R. R. co. for the construction of the road from Carthage, Mo.,

to Independence, Kansas. He immediately began work under the contract, and so continued until the fall of 1873.

XII. Although the entire issue of first mortgage bonds, amounting to $5,000,000, had been agreed to be placed with J. & W. Seligman & Co., yet, only $864,000 of the bonds were in fact issued and were negotiated and sold by J. & W. Seligman & Co., and they themselves became holders of the same to the amount of over $400,000, which they took at the rate of 65 cents on the dollar.

37 XIII. At the first annual stockholders' meeting for the election of directors, after the issue of the certificate for $6,000,000 of stock, held pursuant to statute, in March, 1873, at Carthage, Mo., the full stock so held by J. & W. Seligman & Co. was voted by J. M. Brown, of the city of New York, by virtue of a written proxy for that purpose executed by said firm.

No change in the management of the road was made by this election, but the former president and manager, L. P. Cunningham, was retained.

38 XIV. Being bondholders to the amount of over $400,000, the Seligmans, together with other bondholders, held a meeting in the fall of 1873, in the city of New York, at which James Baker, of St. Louis, was invited to be present. Here arrangements were made by which Baker, as the representative of the bondholders, should obtain for them control of the road by means of this $6,000,000 of stock held by the Seligmans; and afterwards, in execution of this arrangement, Joseph Seligman, the defendant, signed a proxy for the purpose of voting this stock, and sent the same to Baker, and the same was delivered to Henry T. Blow for the purpose of being voted at the next annual election for

39 directors, in March, 1874, at which time the same was voted by Mr. Blow, as proxy for J. & W. Seligman & Co. At this election Baker, as the representative of all the bondholders, named or produced the ticket for directors, which was elected.

At this election said Baker, as the representative of the Seligmans and other bondholders, was elected, and also the defendant was made a director through the use of the proxy signed by him, of the stock held by his firm. The result of this election, with the names of the directors elected, was spread upon the corporate book containing the proceedings of the

40 directory. Joseph Seligman knew of his election as director.

XV. Some time after Burgess stopped work on the road on October 1st, 1874, a special meeting of the directors was called at St. Louis, at which Baker was present, but Seligman, who lived in New York, was not present, at which the following resolution was adopted:

The board met at 7 p. m., Mr. James Baker in the chair. The following resolution was offered by Mr. C. W. Rogers, and after being duly seconded by Mr. A. A. Talmage, was put to a vote with the following result, the roll being called by the secretary: Mr. James Baker, Mr.

41 R. W. Wright, Mr. A. A. Talmage, Mr. C. W. Rogers, and Mr. Ezra Miller voting in the affirmative, and thus adopting the resolution by a unanimous vote.

Whereas this company has been and is still unable to pay any part of the interest due on its first mortgage bonds now outstanding to the amount of $741,921, be'ing seven per cent. interest in gold; and whereas the coupons on said bonds which matured on the 1st day of November, 1872, and on

the 1st day of May, 1873, and on the 1st day of November, 1873, and on the 1st day of May, 1874, which, with the interest thereon, re-
42 main due and unpaid; and whereas the coupons for the interest due on twenty of said bonds on the 1st (first) day of November, 1872, and on the 1st (first) day of May, 1873, were presented to this company for payment, and payment thereof demanded after the same became due, and more than six months prior to this date, and default was made by this company in the payment thereof, which was continued for more than six months and still does continue; and whereas the trustees in said mortgage have made application to the company to have all the mortgaged property and franchises and all the property, rights, and franchises, and choses in action, and every other thing conveyed by such mortgage
43 or deed of trust to them turned over and the possession thereof delivered up to them as such trustees in the manner and for the purpose provided in said mortgage: Therefore be it—

Resolved by this board of directors, that the president of this company, James Baker, be, and he is hereby, authorized and directed to turn over, transfer, and assign all of said property, rights and franchises to the said trustees mentioned in said mortgage, or to their agent or attorney duly authorized by them to receive the same.

On motion of C. W. Rogers, esq., the meeting then adjourned.

JAMES BAKER,
President.

EZRA MILLER, *Secretary.*

44 XVI. In December, 1874, thereafter, the railroad was sold under the trust deed, and Joseph Seligman and Josiah Macy, as a bondholders' committee, became the purchasers under an agreement that it should be purchased for the benefit of the following bondholders, who executed the agreement, viz:

J. & W. Seligman & Co., holding bonds	$416,500
Perkins, Livingston, Post & Co., holding bonds	73,500
Josiah Macy & Sons	202,000
A. & P. R. R. Co.	39,000
Rob't S. Noyes	13,000
Brown & Wadsworth	106,000

There were about $14,000 of outstanding bonds not represented in this agreement.

45 XVII. At the date of the trustees' sale there were 44 miles of railroad in running operation and 27 other miles partially completed.

XVIII. The R. R. corporation was dissolved in December, 1874, within the meaning of the statute of Missouri authorized proceedings by creditors against stockholders.

XIX. On the 5th day of November, 1874, Burgess obtained judgment in the district court of Cherokee Co., Kansas, against the Memphis, Carthage & Northwestern R. R. Co. for work done and material furnished under the contract of June 14th, 1872, for the sum of $73,661, and
46 costs, which judgment under the statute of that State bears interest at the rate of seven per cent.; which said judgment is in this following form, as shown by the record thereof:

And afterwards, to wit, at the October term, A. D. 1874, of the said court, and on the tenth judicial day thereof, the same being the 5th day of November, A. D. 1874, the following proceedings were had, to wit, as appears from Journal E of said court, at page 68:

EDWARD BURGESS, PLAINTIFF,
vs.
THE MEMPHIS, CARTHAGE AND NORTHWESTERN Railroad Co., defendants.
No. 1077.

47 And now at this day this cause came on for hearing, and it appearing to the court that this action has been settled and compromised and judgment rendered in favor of plaintiff, as per stipulations filed, which stipulation or agreement is that the plaintiff shall take judgment against the defendant for the sum of $73,661. And said agreement further provides as follows: And it is also hereby agreed that the judgment so entered, to wit, $73,661, will be entitled to a credit of the amount which has been paid to sub-contractors and laborers of the said plaintiff, Edward Burgess, by the defendant on that part of the Memphis, Carthage
48 and Northwestern Railroad between Minersville, Missouri, and Oswego, Kansas, when the exact amount thereof has been ascertained and proper vouchers therefor furnished. This agreement is not to authorize the establishment of the lien prayed for in the petition.

It is therefore by the court considered, ordered, and adjudged that the plaintiff have and recover of and from the defendant the amount as above stipulated, together with the costs, herein taxed at $15.50, and execution is awarded therefor.

No credits were ever claimed on said judgment.

The stipulation referred in said judgment is as follows:

49 On the 16th day of October, A. D. 1874, an agreement was filed in words and figures as follows, to wit:

In the district court of Cherokee Co., State of .

EDWARD BURGESS
vs.
MEMPHIS, CARTHAGE & NORTHWESTERN Railroad Co. and others.

It is hereby agreed that a judgment may be entered in the above stated case in favor of the plaintiff for the sum of seventy-three thousand six hundred and sixty-one ($73,661) dollars; and it is also hereby agreed that judgment so entered will be entitled to a credit of the amount which has been paid to subcontractors and laborers of the said plaintiff (Ed-
50 ward Burgess) by the defendant, on the part of the Memphis, Carthage and Northwestern Railroad, between Minersville, Missouri, and Oswego, Kansas, when the exact amount thereof has been ascertained and proper vouchers therefor furnished. This agreement is not to authorize the establishment of the lien prayed for in the petition.

MOFFETT, O'GRADY & MULLERY,
Attorney' for Plaintiff.
MEMPHIS, CARTHAGE AND N. W. R. R. Co.,
By JAMES BAKER, *President.*

XX. That the work done by the plaintiff for the railroad company was under and in pursuance of the following contract:

51 This agreement, made and entered into this 14th day of June, A. D. 1872, by and between John Finn and Edward Burgess, of St. Louis County, in the State of Missouri, party of the first part, and the Memphis, Carthage and Northwestern Railroad Company, of the States of Missouri and Kansas, party of the second, witnesseth:

That the said party of the first part hereby covenants and agrees to construct and complete the grading, masonry, paving, grubbing, and clearing, including the furnishing of materials requisite for the same, upon that portion of the Memphis, Carthage and Northwestern Railroad

52 Company, from the depot in the town of Carthage, in the State of Missouri, to the depot in the town of Independence, Kansas, a distance of eighty-three miles, more or less, in accordance with plans to be furnished and instructions to be given from time to time by the said party of the second part; and the said party of the first part agrees to begin said work of construction within five days from the date hereof, and prosecute the same with diligence to completion.

In consideration whereof the said party of the second part agrees to pay at the rates and prices as follows, viz:

Earthwork, per cubic yard, thirty-five cents; hard pan and loose rock, per cubic yard, seventy-five cents; gumbo, per cubic yard, fifty

53 cents; solid rock, per cubic yard, one dollar and seventy-five cents; second-class masonry, per cubic yard, ten dollars and fifty cents ($10.50); third-class masonry, per cubic yard, six dollars; grubbing and cleaning, per acre, fifty dollars; haul and material, per yard, for each one *one* hundred feet over five hundred feet, two cents (2 cts). And it is agreed that the said work as it progresses shall be accurately measured, estimated, and accepted monthly, between the first and tenth days of each callendar month, by the chief engineer of the party of the second

54 part, and thereupon payment shall be made to the party of the first part for the amount so ascertained to be due; provided, however, that municipal bonds, as hereinafter mentioned, can be had under the terms of the subscriptions, and are applicable to that purpose; and if the bonds should not be due and payable by the several municipalities subscribing in any of them at the time of such monthly estimates, then such payment to be made by the party of the second part so soon thereafter as such bonds can be obtained under the terms of the subscription.

And the parties of the first part further agree that in the pay-

55 ment for the said work and materials in lieu of cash they will take and receive at par the bonds of any of the towns, townships, and counties of the States of Missouri and Kansas through which the said railroad passes, bearing ten per cent. interest per annum, or the equivalent thereof in such bonds bearing a lower rate of interest issued duly according to law to the said party of the second; and the said party of the second part covenant's and agrees to do and perform all the acts necessary to enable the parties of the first part to obtain any and all of said municipal bonds due them as soon as practicable, by the compliance on its part with all the conditions under which said bonds were subscribed

56 and pledged, and to appropriate such amount of them as may be required exclusively to the payment of the party of the first part, and

not to sell or hypothecate them for any other purpose than such payment, excepting certain twenty thousand dollars of Mineral Township bonds in Jasper County, Mo., now in possession of said company, which said Mineral Township bonds the company shall be permitted to retain and use accounting to said Finn and Burgess for the same by the delivery of a like amount of bonds hereafter to be obtained, bearing the same rate of interest (and the said party of the second part hereby authorizes and em-
57 powers the said party of the first part to ask, demand, and receive any and all municipal bonds from the respective authorities to the extent of any and all estimates for work and materials done and furnished under the contract), that shall remain due and unpaid for, the said receipt to be paid in behalf of the party of the second part, and applicable to the amounts due on this contract to the party of the first part.

It is further agreed that any failure on the part of the party of the second part to make payment, or to deliver the bonds aforesaid, or any installment thereof, when and as the same shall become due un-
58 der the terms of this contract shall confer upon the party of the first part the right and power to annul and abandon this contract at their option, to suspend all work and labor thereunder until a reasonable time after said default in the payment of all arrears that are due according to the provisions hereof shall have been rectified. And the party of the second part covenants and agrees that it will transport, without cost or charge, all men, supplies, and materials requisite and to be used by the said parties of the first part in the prosecution of the work from Pierce City westward over its railroad to the points where the same can be
59 reached by its cars, excepting as to the actual costs incurred at terminal points in stations in handling such supplies or materials by the railroad company.

And it is further provided that if the parties of the first part shall not promptly pay for work and labor as the same is done upon said railroad under this agreement, and according to the stipulations that may be made with subcontractors or others, then the party of the second party may elect to proceed to pay such sums as may be due, and if on such failure to pay, the said company shall pay any such sums as are due, it shall be authorized to charge the same up against parties of the first part, with
60 fifteen per centum per annum interest.

(And it is further agreed that the parties of the first part shall not be under any obligations to proceed with the work of construction as aforesaid unless bonds or subsidies to fully pay for such construction have been first obtained of the towns, townships, and counties through which it proposed to construct such railroad, and such bonds, ample for the construction through such towns, townships, and counties, have been first deposited so as to be within the control of the parties hereto on compliance mutually with the contract made with such town, township, or county.)

And it is further agreed that any work done by the party
61 of the first part at the request of the party of the second part not hereinbefore mentioned shall be paid for in bonds as aforesaid, at the actual cost thereof, and in addition thereto fifteen per centum.

In this contract the classification of material, is to be regarded as the same in a certain contract made between said Edward Burgess and said Cunningham, the seventeenth day of October, A. D. 1871, for the con-

struction of said railroad between Pierce City and Carthage, except as to gumbo, which is to be decided by the engineer in charge.

62 Witness our hands the day and year first above mentioned.

(Signed in duplicate.)

EDWARD BURGESS.
JOHN FINN.
MEMPHIS, CARTHAGE & NORTHWESTERN RAILROAD COMPANY,
By L. P. CUNNINGHAM, *President.*

This agreement, made the 20th day of November, A. D. 1872, by and between Edward Burgess, party of the first part, and the Memphis, Carthage & Northwestern Railroad Company, party of the second part, supplemental to an agreement dated June 14th, 1872, between said parties, Burgess having since succeeded to all the rights and duties

63 of Finn & Burgess, parties of the first part, witnesseth:

That said Burgess consents and agrees that said original agreement shall be so modified and changed that certain classification therein named and designated as "hard-pan" and "gumbo" be stricken from said agreement and not in anywise considered as a part thereof. In consideration whereof the said company agrees that the price of loose earth in said agreement shall be raised to forty cents (40 cents) per cubic yard, and the price of the masonry of the bridges across Spring River, Neosho River, and Verdigris River shall be raised one dollar and fifty

64 cents ($1.50) in addition per cubic yard to the price named in said original agreement, the said prices thus modified to be paid in the manner as in said original agreement is more fully expressed. And the said company further agrees that the bonds subscribed by the several townships from Spring Valley, in Jasper County, Missouri, to the town of Independence, in Montgomery County, Kansas, inclusive, shall be held by the financial agents or trustees of the said respective townships having so subscribed for delivery only to said Burgess, or according to his order upon demand, accompanied with estimates by the engi-

65 neer, approved by the president of the company, of work and materials by him done and furnished upon said railroad and remaining due and unpaid, and said company agrees to demand and receive of said bonds only such as remain undelivered after the claim and demands of said Burgess, under his contract of June 14th, 1872, shall have been fully settled and satisfied.

Dated the day and year first above mentioned.

In duplicate.

(Signed) MEMPHIS, CARTHAGE AND NORTHWESTERN RAILROAD COMPANY,
By S. P. CUNNINGHAM,
President.
EDWARD BURGESS.

Upon the foregoing facts the court finds, as a conclusion of law, that the defendant is entitled to judgment.

It is therefore considered by the court that the plaintiff take nothing

by his writ herein, and that the defendant, Joseph Seligman, go hence without day, and have and recover of said plaintiff, Edward Burgess, his costs herein expended, and that a fee bill or execution issue therefor.

To which finding of law and judgment the plaintiff then and there duly excepted.

66 And thereupon, on said last named day, the following further proceedings were had and appear of record in said cause, to wit:

EDWARD BURGESS, PLAINTIFF,
vs.
JOSEPH SELIGMAN, DEFENDANT.

Now comes the plaintiff, by his attorneys, and files motion for a new trial; upon consideration whereof it is ordered that said motion be, and the same is hereby, overruled, and thereupon said plaintiff presents to the court his two separate bills of exceptions, which are allowed, signed, and ordered to be filed and made part of the record herein.

Said bills of exceptions are in words and figures as follows, to wit:

67 EDWARD BURGESS, PLAINTIFF,
vs.
JOSEPH SELIGMAN, DEFENDANT.

Now on this 28th day of April, 1879, plaintiff in the above case filed his motion for a new trial in words and figures following, to wit:

Now on this day comes the plaintiff and moves the court for a new trial and rehearing in the above entitled cause, and assigns therefor the following reasons:

1st. The judgment is against the law and the facts found in the case.

2d. The court improperly sustained defendant's objection to the introduction of plaintiff's evidence, and improperly excluded the same.

3d. The court erroneously gave judgment for the defendant.

68 Which motion was overruled, to which ruling the plaintiff then and there excepted, and asks that this bill of exceptions be signed, sealed, and allowed, which is accordingly done.

(Signed) JOHN F. DILLON, [SEAL.]
Judge Circuit Court of United States
for Eastern District of Missouri.

EDWARD BURGESS, PLAINTIFF,
vs.
JOSEPH SELIGMAN, DEFENDANT.

Be it remembered that at the trial of this cause the plaintiff offered to prove by Edward Burgess, witness in his own behalf, that shortly after the March election, 1873, of directors for said railroad (at which
69 the $6,000,000 stock held by J. & W. Seligman & Co. was voted by Mr. Brown as their proxy) plaintiff had a conversation, in the State of Kansas, with two of the directors of said railroad, who were present at said election, and in such conversation they informed him that the Seligman stock had been voted; to the introduction of which evidence

the defendant objected as immaterial and incompetent, which was sustained by the court, to which ruling plaintiff at the time excepted.

And the court then and there signed and sealed this bill of exceptions during the trial.

JOHN F. DILLON. [SEAL.]

70 And afterwards, to wit, on the 31st day of May, A. D. 1879, during said term of court, the following further proceedings were had and appear of record in said cause, to wit:

EDWARD BURGESS, PLAINTIFF,
vs.
JOSEPH SELIGMAN, DEFENDANT.

Now comes the plaintiff, by his attorney, and presents to the court a writ of error to remove this cause to the Supreme Court of the United States and a citation citing and admonishing the defendant to be and appear at a Supreme Court of the United States, to be holden at Washington, on the second Monday of October next; which said writ of error
71 was allowed and said citation signed by the honorable John F. Dillon, circuit judge, who presided at the trial of this case. And the plaintiff also presents a bond, as required by law, which is approved by the honorable Arnold Krekel, judge, and ordered to be filed as part of the record herein.

Said bond is in words and figures following, to wit:

Know all men by these presents that we, Edward Burgess and Henry L. Sutton, are held and firmly bound unto Joseph Seligman in the full and just sum of five hundred dollars, to be paid to the said Joseph Seligman, his heirs, executors, administrators, or assigns; to which payment
72 well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 30th day of May, in the year of our Lord one thousand eight hundred and seventy-nine.

Whereas lately, at the March term, A. D. 1879, of the circuit court of the United States for the eastern district of Missouri, in a suit depending in said court between Edward Burgess, plaintiff, and Joseph Seligman, defendant, judgment was rendered against the said Edward Burgess, and the said Edward Burgess having obtained a writ of error of the said
73 court to reverse the judgment in the aforesaid suit and a citation directed to the said Joseph Seligman, citing and admonishing him to be and appear at a Supreme Court of the United States, to be holden at Washington, the second Monday of October next:

Now the condition of the above obligation is such that if the said Edward Burgess shall prosecute said writ to effect, and answer all damages and costs if he fail to make good his plea, then the above obligation to be void, else to remain in full force and virtue.

EDWARD BURGESS. [SEAL.]
HENRY L. SUTTON. [SEAL.]

Approved by—
A. KREKEL, *Judge.*

74 UNITED STATES OF AMERICA,
Eastern District of Missouri, ss:

I, M. M. Price, clerk of the circuit court of the United States in and for the eastern district of Missouri, do hereby certify that the writing hereto attached to be a true copy of the pleadings and proceedings in case No. 1336 of Edward Burgess, plaintiff, against Joseph Seligman, defendant, as fully as the same remain on file and of record in said case in my office.

In witness whereof I hereunto subscribe my name and affix the seal of said court, at office, in the city of St. Louis, in said district, this 25th day of October, in the year of our Lord eighteen hundred and seventy-nine.

[SEAL.]

M. M. PRICE,
Clerk of said Court,
By A. P. SELBY,
Deputy.

(Indorsed:) No. . United States circuit court, eastern district of Missouri. against . Duly certified copy of the in the above-entitled cause.

(Indorsement on cover:) No. 136. Edward Burgess, plaintiff in error, vs. Jesse Seligman, James Seligman, and David T. Seligman, executors of Joseph Seligman, deceased. E. Missouri C. C. U. S. Filed 3 November, 1879.

ADDITION TO RECORD 136.

1 Supreme Court of the United States. October term, 1882.

EDWARD BURGESS, PLAINTIFF IN ERROR,
vs.
JESSE SELIGMAN ET AL., EXECUTORS OF JOSEPH Seligman, deceased. } No. 136.

Stipulation of counsel and addition to record.—Filed September 18, 1882.

In the Supreme Court of the United States.

EDWARD BURGESS, PLAINTIFF IN ERROR,
vs.
JESSE SELIGMAN, JAMES SELIGMAN, AND DAVID J. Seligman, executors of Joseph Seligman, deceased, defendants in error.

It is hereby stipulated, without prejudice to the hearing of the above cause in the court above named, that the certified copy of the records of United States circuit court for the eastern district of Missouri, hereto attached, may be considered as part of the record in said cause now on file in said Supreme Court, in the same manner and with like effect as though incorporated in the original transcript of the record and proceed-
2 ings of said cause transmitted to said Supreme Court by the clerk of said circuit court in obedience to the command of the writ of error in said cause.

Signed this 14th day of September, 1882.

JOHN P. ELLIS,
Attorney for Plaintiff in Error.
JAS. O. BROADHEAD,
Attorney for Defendants in Error.

(Indorsed:) Supreme Court of the United States. No. 136. Edward Burgess, pl'ff in error, vs. Jos. Seligman's ex'rs, def'ts in error. Stipulation to perfect record.

3 UNITED STATES OF AMERICA,
Eastern District of Missouri, ss:

In the circuit court of the United States in and for said district.

Be it remembered that on the sixth day of September, A. D. 1878, the following proceedings were had and appear of record in said court, to wit:

EDWARD BURGESS, PLAINTIFF,
vs.
JOSEPH SELIGMAN ET AL., DEFENDANTS. } 1336.

Now come the defendants, by James O. Broadhead, their attorney, and file transcript the St. Louis circuit court, and enter their appearance herein.

Said transcript is in words and figures following, to wit:

4 STATE OF MISSOURI,
City of St. Louis, ss:

Be it remembered that on the 8th day of March, A. D. 1878, there was filed in the office of the clerk of the circuit court of the city of St. Louis a petition, which is in words and figures following, to wit:

Petition.

In the circuit court of the city of St. Louis, Missouri.

EDWARD BURGESS, PLAINTIFF,
vs.
JOSEPH SELIGMAN, JAMES SELIGMAN, AND Jesse Seligman, defendants.

I. The plaintiff states that he is a resident of the county of St. Louis, and State of Missouri; that the defendants are non-residents of said State, and at the dates hereinafter mentioned and now, they were and are doing business as a copartnership, under the firm-name and style of J. & W. Seligman & Co.

II. That heretofore, to wit, on the first day of Sept., 1874, and for a long time previous thereto, the Memphis, Carthage and Northwestern Railroad Company was a railroad corporation organized and ex-
5 isting under the general laws of the State of Missouri.

III. That on said last-named day judgment was rendered in favor of plaintiff and against said corporation by the district court in and for the county of Cherokee, and State of Kansas, for a large sum of money, to wit, the sum of seventy-three thousand six hundred and seventy dollars ($73,670.00), and that said court then and there had full and complete jurisdiction of the subject-matter of said judgment and of the said parties thereto; that plaintiff still is the owner of said judgment, no part of which has ever been collected or paid.

IV. That afterwards, to wit, on the first day of Oct., 1874, said railroad corporation was dissolved, leaving the judgment aforesaid unpaid.

V. That the capital stock of said corporation consisted of 100,000 shares of one hundred dollars each; that the defendants, in their firm-name aforesaid, were, at the date of said dissolution and of said judgment, and still are, stockholders of said capital stock, then and still holding 60,000 of the shares of said stock, of the nominal value of $6,000,000.00; that at the date of said dissolution and judgment and now there is due and unpaid on said stock so held by defendants the amount
6 and sum of $1,000,000. Wherefore plaintiff asks judgment against

defendants in the sum of seventy-three thousand six hundred and seventy dollars, with interest and costs.

C. B. DRUMMOND,
Att'y for Plaintiff.

Whereupon a summons issued, directed to the sheriff of the city of St. Louis, which, with the return thereon, is in words and figures following, to wit:

CITY OF ST. LOUIS:

The State of Missouri to the sheriff of the city of St. Louis, greeting:

We command you to summon Joseph Seligman, James Seligman, and Jesse Seligman to appear before the judges of our circuit court on the first day of the next term thereof, to be held in the city of St. Louis, on the first Monday of April next, then and there to answer the complaint of Edward Burgess as set forth in the annexed petition, and have you then and there this writ:

Witness Philip Stock, clerk of our said court, with the seal
7 thereof hereto affixed, at office, in the city of St. Louis, this 8th day of March, in the year of our Lord eighteen hundred and seventy-eight.

[SEAL.] PHILIP STOCK, *Clerk.*

Executed this writ in the city of St. Louis on the 11th day of March, 1878, by delivering a copy of writ and petition as furnished by the clerk of the defendant Joseph Seligman. The other defendants cannot be found in the city of St. Louis.

JOHN FINN, *Sheriff,*
By F. P. HARRISON, *Deputy.*

Fees, $2.00.

On the 2nd day of April, A. D. 1878, the following petition for removal of cause to United States court was filed, in words and figures following, to wit:

Petition for removal to U. S. court.

In the St. Louis court, April term, 1878.

EDWARD BURGESS
vs.
JOSEPH SELIGMAN ET AL.

Now comes the above-named Joseph Seligman, the only defendant who has been served with process in the above-entitled cause, and states that
he is a citizen of the State of New York, and that the plaintiff,
8 Edward Burgess, is a citizen of the State of Missouri; that the amount in dispute in their cause, exclusive of costs, exceeds the sum of five hundred dollars, and he prays that the said suit may be removed for trial into the circuit court of the United States for the eastern district of Missouri, next to be held in this district on the third Monday of Sept., A. D. 1878, at St. Louis.

The said petitioner herewith tenders his bond in the sum $5,000.00, conditioned as prescribed by law in such cases.

JAMES O. BROADHEAD,
Att'y for Def't Jos. Seligman.

And afterwards, at the April term, A. D. 1878, of said circuit court, the following proceedings were had in this cause, to wit:

Order for removal.

WEDNESDAY, *April 3rd*, 1878.

EDWARD BURGESS
vs.
JOSEPH SELIGMAN ET AL. } 46118.

On petition of def'ts, by attorney, heretofore filed herein, it is ordered by the court that on the defendants giving bond in the sum of five thousand dollars, to be approved by the court, that the clerk of this court forthwith certify to the circuit court of the United States for the eastern
9 district of Missouri, a full, true, and complete transcript of the record and proceedings in this cause as fully as the same remain on file and appear of record in this office. Bond approved and filed.

Which bond for removal is in words and figures following, to wit:

Bond.

Know all men by these presents that I, Joseph Seligman, as principal, and Oliver Garrison, as surety, are held and firmly bound unto Edward Burgess in the penal sum of five thousand dollars, the payment whereof well and truly to be made unto the said Edward Burgess, his heirs and assigns, we bind ourselves, our heirs, representations, and assigns, jointly, and severally, firmly by these presents; that, upon these conditions, the said Joseph Seligman having petitioned the circuit court of the city of St. Louis, State of Missouri, for the removal of a certain cause therein pending, wherein said Edward Burgess is plaintiff, and Joseph Seligman et al. are defendants, to the circuit court of the United States in and for the eastern district of Missouri.

Now, if said Joseph Seligman, your petitioner, shall enter in the said circuit court of the United States, on the first day of its next ses-
10 sion, a copy of the record in said suit, and shall well and truly pay all costs that may be awarded by said circuit court of the United States if said court shall hold that said suit was wrongfully or imperfectly removed thereto, then this obligation to be void; otherwise in full force and virtue.

Witness our hands and seals this day of , A. D. 1878.

JOSEPH SELIGMAN. [SEAL.]
O. GARRISON. [SEAL.]

Approved in open court April 3rd, 1878.

PHILIP STOCK, *Clerk.*

STATE OF MISSOURI,
City of St. Louis, ss:

I, Philip Stock, clerk of the circuit court, do hereby certify the foregoing to be a true, full, and complete transcript of the record and proceedings in the above-entitled cause as fully as the same remain on file and of record in my office,

In testimony whereof I hereunto set my hand and affix the seal of said court, at office, in the city of St. Louis, this 5th day of April, A. D. 1878.

[SEAL.] PHILIP STOCK, *Clerk.*

Costs of case, $12.50; costs of this transcript, 4.00—total, $16.50.

11 UNITED STATES OF AMERICA,
Eastern District of Missouri, ss:

I, M. M. Price, clerk of the circuit court of the United States in and for the eastern district of Missouri, do hereby certify the writing hereto attached to be a true copy of transcript from St. Louis circuit court, and record of filing same in the circuit court of the United States in and for the eastern district of Missouri, being part of record omitted by error from the transcript to the Supreme Court of the United States in case No. 1336 of Edward Burgess, plaintiff, against Joseph Seligman, defendant, as fully as the same remain on file and of record in said case in my office.

In witness whereof I hereunto subscribe my name and affix the seal of said court at office, in the city of St. Louis, in said district, this 14th day of September, in the year of our Lord eighteen hundred and eighty-two.

[SEAL.] M. M. PRICE,
Clerk of said Court.
By A. P. SELBY,
Deputy.

(Indorsed:) No. 1336. United States circuit court, eastern district of Missouri. Edward Burgess against Joseph Seligman. Duly certified copy of part of record in the above-entitled cause.

(Also indorsed:) Supreme Court U. S., 1882. October term. No. 136. Edward Burgess, pl'ff in error; Jesse Seligman et al. Stipulation of counsel & addition to record. Filed 18' Sept'r, 1882.

(Stamp:) Office Supreme Court U. S. Filed Sep. 18, 1882. James H. McKenney, clerk.

OFFICE SUPREME COURT U. S.
DEC 14 1882
JAMES H. McKENNEY, Clerk.

17-20

SUPREME COURT OF THE UNITED STATES.

No. 136.

EDWARD BURGESS,
PLAINTIFF IN ERROR,

vs.

SELIGMAN ET AL.

Missouri Statutes and Supreme Court Decisions.

JUDD & DETWEILER, PRINTERS.

MISSOURI.

Constitution and Statutes.

(In force from 1871 to 1879.)

Constitution, Art. VIII, Sec. 6. Dues from private corporations shall be secured by such means as may be prescribed by law, but in no case shall any stockholder be individually liable in any amount over or above the amount of the stock owned by him or her. (1 Wagner's Mo. St., p. 67.)

1 Wagner's Mo. St., 288; Chapter 37 relates to "*Corporations—Private.*"

Article I relates to "*General powers and liabilities.*"

Sec. 22, p. 293. If any company, formed under this act, dissolve, leaving debts unpaid, suits may be brought against any person or persons who were stockholders at the time of such dissolution without joining the company in such suit; and if judgment be rendered and execution satisfied, the defendant or defendants may sue all who were stockholders, at the time of dissolution, for the recovery of the portion of such debt for which they were liable, and the execution upon the judgment shall direct the collection to be made from the property of each stockholder respectively; and if any number of stockholders (defendants in the case) shall not have property enough to satisfy his or their portion of the execution, then the amount of deficiency shall be divided equally amongst all the remaining stockholders, and collections made accordingly, deducting from the amount a sum in proportion to the amount of stock owned by the plaintiff at the time the company dissolved.

Article II, p. 295, relates to "*Railroad Companies.*"

Sec. 1, p. 296. Any number of persons, not less than five, may form a company for the purpose of constructing, maintaining, and operating a railroad for public use, in the conveyance of persons and property; and for that purpose may make and sign articles of association in which shall be stated the name of the company; the number of years the same is to continue; the places from and to which the road is to be constructed or maintained or operated; the length of such road, as near as may be, and the name of each county in the State through or into which it is made or intended to be made; the amount of the capital stock of the company, which shall not be less than ten thousand

dollars for every mile of road constructed or proposed to be constructed, and the number of shares of which said capital stock shall consist; and the names and places of residence of the directors of the company, not less than five nor over thirteen in number, who shall manage its affairs for the first year and until others are chosen in their places. Each subscriber to such articles of association shall subscribe thereto his name, place of residence, and the number of shares of stock he agrees to take in said company. On compliance with the provisions of the third section of this chapter, such articles of association may be filed in the office of the Secretary of State, who shall endorse thereon the day they are filed, and record the same in a book to be provided by him for that purpose, and, thereupon, the persons who have so subscribed such articles of association, and all persons who shall become stockholders in such company, shall be a corporation by the name specified in such articles of association, and shall possess the powers and privileges granted to corporations, and be subject to the provisions relating thereto herein contained.

Sec. 3, p. 298. Such articles of association shall not be filed and recorded in the office of the Secretary of State until at least one thousand dollars of stock for every mile of railroad proposed to be made is subscribed thereto, and five per cent. paid thereon in good faith and in cash to the directors named in said articles of association; nor until there is endorsed thereon or annexed thereto an affidavit made by at least three of the directors named in said articles, that the amount of stock required by this section has been in good faith subscribed, and five per cent. paid in cash thereon as aforesaid, and that it is intended in good faith, to construct or maintain and operate the road mentioned in such articles of association, which affidavit shall be recorded with the articles of association as aforesaid.

Sec. 6, p. 299. There shall be a board of not less than five nor over thirteen directors, of every corporation formed under this chapter, to manage its affairs. Said directors shall be chosen annually by a majority of the votes of stockholders, at an annual election, which is hereby ordered to take place at the office of the company, on *the first Tuesday of March* in each and every year, in such manner as may be prescribed in the by-laws of the corporation, and they may and shall continue to be directors until others are elected in their places. In the election of directors each stockholder shall be entitled to one vote for each share of stock held by him. The inspectors of the first election of directors shall be appointed by the Board of Directors named in the articles of association. *No person shall be a director unless he is a stockholder owning stock absolutely in his own right*, and qualified to vote for directors, at the election of which he shall be chosen.

Every corporation formed under this chapter shall be subject to the following regulations concerning the election of directors, viz:

* * * * * * *

IV. At every election of directors, the transfer books of the corporation shall be produced to test the qualifications of voters; and no person shall be admitted to vote directly or by proxy, except those in whose names the shares of the stock of the corporation shall stand on such books, and shall have stood for at least thirty days previous to the election.

V. *No person shall be admitted to vote on any shares of stock belonging to or hypothecated to the corporation in which the election is held.*

VIII. Every such corporation shall keep a book, in which the transfer of shares of its stock shall be registered; and another book, containing the names of its stockholders, which book shall at all times during the usual hours of business, for thirty days previous to an election of directors, be open to the examination of stockholders.

(1 Wagner's Mo. St., p. 301, § 9):

No person holding stock in any such company as executor, administrator, guardian, or trustee, and no person holding such stock as collateral security shall be personally subject to any liability as a stockholder of such company, but the person pledging such stock shall be considered as holding the same, and shall be liable as a stockholder accordingly, and the estates and funds in the hands of such executor, administrator, guardian, or trustee, shall be liable, in like manner and to the same extent, as the testator or intestate, or the ward or person interested in such fund, would have been if he had been living and competent to act, and held the stock in his own name.

GRISWOLD vs. SELIGMAN.

Supreme Court of Missouri, November, 1880.

1. One who accepts and hold certificates for unpaid shares of stock in a corporation, and votes such shares at annual elections, is estopped from denying his liability as a stockholder to the corporation or its creditors, although such shares were issued to him under an agreement in writing that they were to be held in trust or as a security only, and were not subscribed for on the books of the company, or otherwise, in the usual manner of making such subscriptions. One may be constituted a stockholder by his conduct as effectually as by the rigid observance of the usual formalities in making subscriptions.

2. Parol evidence is not admissible to show that the stock was voted under an arrangement with the company, made outside of the written contract for a specific purpose, to the effect that such holder should have the privilege of voting the stock without attendant liability.

3. In a proceeding to enforce such liability, it is unnecessary to show that the creditor became such subsequently to the acquisition of the stock by the defendant, or in consequence thereof, or altered his condition by giving credit to the company on the faith of defendant being a stockholder. Under the Missouri statute the liability attaches to the holder of the stock at the date of the execution.

4. Parties dealing with a corporation are not affected with notice of entries made upon its corporate books limiting the liability of holders of unpaid stock.

5. Capital stock issued by a railroad corporation to be held in trust, or as collateral security, is not within the protection of sec. 771, Rev. Stat., Mo., which provides: "No person holding stock in any such company as executor, administrator, guardian or trustee, and no person holding such stock as collateral security, shall be personally subject to any liability as a stockholder of such company; but the person pledging such stock shall be considered as holding the same and shall be liable as a stockholder accordingly, and the estates and funds in the hands of such administrator, guardian or trustee, shall be liable in like manner and to the same extent as the testator or intestate, or the ward or person interested in such fund, would have been if he had been living and competent to act, and held the stock in his own name."

Appeal from Jasper Court of Common Pleas.

The Memphis, Carthage & Northwestern Railroad Company, a Missouri corporation, authorized by its articles of association to issue $10,000,000 of capital stock, made a written contract, in February, 1872, with J. & W. Seligman & Co., whereby said firm agreed to become the financial agents of said company, and make certain advances to aid the construction of its railroad, in consideration that it would deposit with them its entire issue of mortgage bonds, and also deposit with them a majority of its authorized capital stock, to remain in their control for one year at least. Thereupon the board of directors resolved: "That, in making negotiations for money with J. & W. Seligman & Co., certificates of a majority of stock be issued to said J. & W. Seligman & Co., to be held by them in trust for the period of twelve months." Thereupon a certificate, in usual form, was issued to said firm for 60,000 shares of stock, which was accepted and is still held by them. This entry was made on the stock transfer book: "J. & W. Seligman & Co.; residence, New York; shares 60,000 (held in escrow); amount, $6,000,000. May 20, 1872." Said firm received and accepted said shares in the above manner, without any formal subscription by them, or any other person, and nothing was ever paid thereon. They voted said shares at two annual elections, electing one member of the firm a director, and controlling the organization and management of the company thereby. Evidence was introduced by defendants, tending to show that the stock was voted under an arrangement with the company, outside of the written contract, by which they were given the privilege of voting it. The plaintiff, Griswold, obtained a judgment against the company, and his execution issued thereon having been returned *nulla bona*, he thereupon instituted a pro-

ceeding, under Rev. Stat. sec. 736, to obtain an execution against said firm as the holders of unpaid stock of the company. The execution was denied.

John P. Ellis and *Joseph Shippen*, for appellant; *James O. Broadhead*, for respondent.

SHERWOOD, C. J., delivered the opinion of the court:

This appeal questions the correctness of the ruling which denied plaintiff's motion for execution against defendants. The point thus presented for determination is, whether the defendants are answerable as stockholders.

The relation of stockholders may be created not only by the usual formalities of subscription and the accepance of stock, but other acts are, in contemplation of law, the legal equivalent of those just mentioned. That is to say, conduct on the part of the person sought to be charged is, of itself, sufficient to accomplish all that could be accomplished by the rigid observance of those formalities usually attendant on becoming a stockholder. The law declaratory of this position is well settled in America and by the earlier authorities in England. Thomp. on Stock., sec. 160. Thus, in an action of debt for calls, one who, though not a subscriber, had paid a call as such, was held estopped to deny his membership, and a like ruling was made in a similar instance, where the defendant had attended the half-yearly meeting of the proprietors. Railway Co. v. Graham, 2 Eng. Railway Cas., 870; Same v. Gunstone, Id. So, also, where the issue raised, as in the cases cited, was whether the defendant was the proprietor of shares and consequently liable for calls, and it appeared that he had represented himself to the company in that capacity, claiming to be registered as such in consequence of scrip certificates purchased by him and sent in to the company, for which he had received receipts and a notice from the company that the scrip would be exchanged for sealed certificates on demand, he was held estopped to deny his liability for calls, though the provisions of the act necessary to make him proprietor had not been complied with by the registry of his name or the entry of any memorial of transfer, Lord Denman, C. J., remarking: "A party can not by his own conduct change his liability at pleasure. * * * * All the machinery which the legislature renders necessary to constitute a member is, in this instance, dispensed with by the conduct of the parties." Railway Co. v. Daniel, 2 Eng. Railway Cas., 728. And that case was held not distinguishable from one decided at the same time, where, in addition to the facts first noted, the defendant had paid calls on some shares, and begged time as to others. Same v. Medina, Id. 735. In such cases it is held that a "valid and binding contract" is formed between the

company and the person sought to be charged as contributory, if there has been a course of dealing with the company wherein they have permitted the alleged transferee to become a shareholder *de facto*. Straffon's Exrs. Case, 1 DeG. Mac. & G., 576, and cases cited. The beneficial use of stock will also render the person so using it liable as a shareholder. This is well illustrated in Maguire's Case, 3 DeG. & Sm., 31, where the son, unaware that two shares had been transferred to him by his father, signed certificates obtained from the company's office as proprietor, and on several occasions by this means secured a free passage in the vessels of the company, was held properly placed on the list as contributory, the vice-chancellor saying: "This gentleman is shown so plainly and distinctly to have represented himself and to have acted as a proprietor, that, in my opinion, it is established that he is a proprietor, and if a proprietor, a partner and a contributory."

In this country instances are abundant where parties, sued as shareholders at the instance of the corporation or of creditors, have been held either estopped by their conduct from denying their liability, or that their conduct was cogent evidence of such liability. Thus, where a party who, though released from the obligation of his subscription, had subsequently voted at the annual meeting for directors, was himself elected as a director, acted in that capacity and as a stockholder, and paid money to the company, although no call was made therefor, it was held in an action for calls that these acts very strongly warranted the presumption that he had resumed his original obligation as a stockholder. R. R. Co. v. Stewart, 41 Pa. St., 54. Upon analogous grounds, one who had been voted a member of a New England parish, had in that capacity attended and voted at parish meetings and acted as trustee of the parish funds, was held a member, and that his body could be taken in execution for a parish debt, though he had not, in compliance with statutory requisition, filed any certificate of membership. Chase v. Bank, 19 Pick, 564. And the enunciation of a similar doctrine is made by the Supreme Court of the United States, when declaring that "an implied promise is proved by circumstantial evidence; by proof of circumstances that show the party intended to assume an obligation. A party may assume an obligation by putting himself in a position which requires the performance of duties." Webster v. Upton, 91 U. S., 65, 3 Cent. L. J., 402. The same court say, in Upton v. Tribilcock, 91 U. S., 45, 2 Cent. L. J., 784: "The acceptance and holding of shares in an incorporation makes the holder liable to the responsibility of a shareholder. * * * A promise to take shares of stock imports a promise to pay for them. The same effect results from an acceptance and holding of a certificate." And where a corporation had accepted parties as

legal stockholders, entered their names on the stock books as such, and given them all the privileges of stockholders, it was held they must be taken to be stockholders for the purpose of liabilities as well as sharing in the profits to be divided among the members. Bank v. Goodman, etc., 9 Cush., 576. In Sanger v. Upton, 91 U. S., 56, 3 Cent. L. J., 721, an action by an assignee of a bankrupt corporation, where stock certificates were issued in blank to the defendant, and she paid upon the stock twenty per cent. of its par value at the time, and a like amount subsequently, and received a dividend from the company, and the stock stood in her name upon the books of the company, she was held liable, Mr. Justice Swayne remarking: "The only question was whether she owned the stock. No one else claimed it. The certificates were issued and delivered to her. They belonged to her. They were the muniment of her title. She could have filled the blanks with her name whenever she thought proper. * * * * She was estopped from denying her ownership. She could not assert her title if there was a profit, and deny it if there was a loss." It is very noteworthy in that case, there was no evidence tending to show that defendant ever subscribed for said certificates of stock, or for any stock of said company, or that her name appeared on any list of stockholders circulated by said company. There is no public register of stockholders provided for in Illinois, where that case arose. 3 Duton, 505. Nor was there any evidence to show that any creditor of the company became such subsequently to defendant's purchase of stock, or in consequence thereof, or in short, altered his condition by giving credit to the company on the faith of defendant being a stockholder. So that case, as well as that of Carver v. Upton, 91 U. S. 64, the record of which I have examined and which was decided upon facts substantially similar, manifestly proceeds upon these grounds, and can, in reason, proceed upon no other—that the time at which a person becomes a stockholder is not considered material, and that whenever a party in consequence of his course of conduct, by his acts and representations, is to be deemed a stockholder as towards the company, is estopped by that conduct from denying his liability as to the company, he is likewise and for the self-same reasons precluded from denying his liability as to creditors. For whenever a person "has been treated as a shareholder by the company and has acted as a shareholder, both he and the company will be estopped from denying that he is a shareholder." 1 Lindley on Part. 129. "If a person is a member of a company, as between himself and the company, then, whether he is so by reason of his having become a member by complying with all requisite formalities, or by reason of the doctrine of estoppel, he ought, upon principle, to be deemed a member to all intents and purposes."

Id. 129. And it would be anomalous, indeed, to hold that such a relationship by estoppel could exist as between a person and a corporation, and yet have no existence as to creditors. Id. 130.

I have been able to find but one case, Vice v. Anson, 1 M. & R. 113, where a creditor suing an individual, not a stockholder *de jure*, for a corporation debt, has been denied recovery unless able to establish that the debt was contracted on the personal credit of the particular person sought to be charged. Mr. Thompson in his recent work treats this case as an exceptional one, and says it has frequently been "distinguished" by the English judges in subsequent cases. Thomp. on Stock. sec. 175. This statement finds confirmation elsewhere. Owen v. Van Uster, 10 C. B. 318; 1 Lindley on Part., pp. 95 and 149, and cases cited.

In Davidson's Case, 3 DeG. and Small, 21; as a mere matter of accommodation he was induced to sign for 100 shares, on the express understanding, a memorandum of which was entered in the company's books, that he was to receive nothing and incur no liability in respect of the shares. Under this agreement he disposed of thirty shares, the purchase money for which was paid to the directory, and afterwards transferred the remaining shares to the manager. He never received or paid anything in respect of the shares, nor did it appear that any one was prejudiced by his conduct, and yet he was held a contributory—Vice Chanceller Bruce saying: "It has not been proved or alleged that strangers did not, and I think it reasonable to assume that strangers did become shareholders after the transaction."

We have in this State no public registry of stockholders as in England and in some of our sister States. The public has no access to the book in which is registered the transfer of shares of stock, or of any other book containing the names of the stockholders, those books being accessible to stockholders alone. 1 W. S. 299, § 6, sub. div. 8. Consequently it must be very obvious that instances of holding oneself out to the world as a stockholder, and so becoming chargeable, can rarely occur here. This view finds support in the reflection that under the terms of our statute no one is liable as a stockholder, unless occupying that relation at the time of the issuing of execution. McClaren v. Franciscus, 43 Mo. 452. So that, if by some fortuitous circumstance a creditor should ascertain that a particular person was a stockholder, and give credit to the corporation on the faith of such person being then a stockholder, it must be upon the faith also that such person would continue to be a stockholder down to the issuance of execution, a supposition which can not with any great show of reason be indulged.

In the present instance the defendants were appointed the financial agents of the company; they were large holders of its bonds, their names were entered on its books as stockholders;

they held, and still retain, an absolute and unconditional certificate for 60,000 shares of stock, which was a majority of the authorized stock; they voted that stock at two annual elections, thereby electing the directors and other officers of the company, thereby obtaining entire management and control of its affairs. If after the course of conduct thus pursued by them, defendants can, in the face of the fact of voting as stockholders, now successfully assert their non-liability as such, it must be confessed that the doctrine of stockholdership, by reason of implied contract and by reason of estoppel, as announced in the foregoing authorities, is shorn of whatever vigor it heretofore has been thought to possess.

To deny in such circumstances defendants' liability, would be to declare the unpalatable doctrine—a doctrine peculiarly unpalatable in American courts—that a person may play fast and loose; may enjoy all the benefits and emoluments of stockholdership without shouldering a tithe of its usually inseparable burdens; may accomplish by an indirection what could not be accomplished directly; may, in a word, be a stockholder to vote but not a stockholder to pay. The bare statement of such a doctrine condemns it, and its perniciously unjust results amply justify the condemnation.

But it is claimed that this case is exempted from the operation of the principles enunciated by the cases cited, and the defendants from the liability which otherwise had been incurred by reason, first, of the contract entered into between defendants and the corporation, and by reason, second, of this statutory provision: "Sec. 9. No person holding stock in any such company as executor, administrator, guardian or trustee, and no person holding such stock as collateral security, shall be personally subject to any liability as a stockholder of such company; but the person pledging such stock shall be considered as holding the same, and shall be liable as a stockholder accordingly, and the estates and funds in the hands of such executor, administrator, guardian, or trustee shall be liable in like manner and to the same extent as the testator or intestate, or the ward or person interested in such fund would have been if he had been living and competent to act, and held the stock in his own name."

Relative to the contract in question, it is clear that parol evidence of contemporaneous "agreements and understandings" is as plainly inadmissible here, as it would be in any other instance whatsoever. (Thomp. on Stock, § 121, and cases cited.) Hence, parol evidence that "it was understood that defendants were to have the privilege of voting the stock," is altogether incompetent to effect the purpose for which offered, *i. e.*, to add to or vary the written contract of the parties. For this reason the act

of voting the stock must be regarded as one not done in the exercise of any contract right, but as a totally independent act—an act certainly not referable in any manner to the contract relied on; since that provides for the company to deposit with defendants a majority of the capital stock authorized to be issued, such stock to remain in the control of defendants for one year at least, and the resolution of the directors merely provides that certificates for a majority of the capital stock be issued to defendants to hold in trust for the period of twelve months. The attempt must, therefore, prove futile, to derive any authority to vote the stock from the stipulations of the contract. Nor is the opinion entertained that the contract brings defendant within the purview of the above quoted section of the statute; for the very terms of the section suppose that stock has been issued in usual course, and then in consequence of either the death of the original stockholder, or the coverture or minority of the person beneficially interested, there is no one *in esse* who should be made "personally subject" to liability as a stockholder; and for this reason it is that the "estates and funds" in the hands of the fiduciaries named, are made liable "in like manner and to the same extent," as if death had not occurred in the one case, or coverture or minority existed in the other.

The only other exception the section makes is, where the stock is held as "collateral security;" but there, while the pledgee is expressly exempted from liability as a stockholder, the pledgor is expressly held liable as occupying that relation. The section, in short, is one of exceptions; one declaratory of non-liability in certain specified instances, leaving the question of liability in all other cases to be determined as if no such section existed; and this, upon the familiar grounds that the expression of one thing is the exclusion of another, and that statutory exceptions are to be strictly construed. (Richardson *vs.* Harrison, 36 Mo., 96, and cases cited.)

The evident purpose and policy, the fundamental idea of the section being discussed, as well as others *in pari materia*, both constitutional and statutory, require that the creditors of the corporation should be abundantly secured against loss; and this end was sought to be accomplished by providing that some person or estate should always be ready to respond to the demands of creditors. It seems too plain for discussion that any other construction would defeat the legislative purpose. If these views be correct, if the statute only exempts those classes of persons which it expressly designates, the defendants falling in neither of such classes, not being executors or administrators of some deceased stockholder, nor guardians or trustees of some one laboring under the previously mentioned disabilities, it can only follow that the case stands here for determination, as before

stated, as if the section under consideration did not exist. Here there was no pledgor, and, consequently, could be no pledgee within the meaning of the statute, since it is little less than absurd to say that a corporation could be its own stockholder. American Railway Frog Co. *vs.* Haren, 101 Mass., 398; Dayton and Cin. R. R. Co. *vs.* Hatch, 1 Disney, 84; *ex parte* Holmes, 5 Cow., 426; Brewster *vs.* Haitley, 37 Cal., 15; State, *ex rel.* Page *vs.* Smith, 48 Vt., 266.

Section 5152 U. S. Revised Statutes is virtually identical with the section just discussed. Britton, president of a national bank, bought stock with the bank's funds and held it registered on the books as held by "Britton, trustee for the bank." Judge Dillon, in Johnson *vs.* Laflin, 6 Cent. L., J., 124, had under consideration section 5152, *supra*, in reference to the facts just stated, and held that "Britton is responsible personally, inasmuch as he had no authority to act for the bank, and as there is no *cestui que trust* who is liable;" and the learned judge further held on that occasion that "in the eye of the law the transfer to Britton as trustee, is a transfer to him individually," and that "if it becomes necessary to assess the stockholders, he will be estopped to say that he is not individually responsible, since he was not acting by authority of any *cestui que trust* capable of taking and holding the shares." A similar ruling was made on the same section in Wheelock *vs.* Kost, 77 Ill., 296, 3 Cent. L. J., 472, a proceeding by creditors, where a party loaned money to a national bank for the benefit of that corporation, and received as collateral security the bank's certificates of stock issued in pledge. Afterwards he received semi-annual dividends thereon, and it was held that he was liable as a stockholder. Mr. Justice Scott remarking: "Whatever relation appellant may have sustained to the corporators of the bank, it seems clear that as to the creditor he occupied the position of a stockholder, and must bear all the burdens that relation imposed. The stock had, in fact, been transferred to him. It stood in his name as owner, and he availed himself of the dividends it earned. Having voluntarily assumed the relation of stockholder, it makes no difference whether he may have done it to assist the bank in its credit or otherwise." This decision met with approval in Pullman *vs.* Upton, 96 U. S., 328, 6 Cent. L. J., 361.

A different view seems to have been taken in Maryland of section 9, *supra* (Matthews v. Albert, 24 Md. 527,) whose provisions seem to have been copied from the statutes of that State. The decision, however, having been made subsequently to our adoption of the section, does not carry with it that authoritative force that otherwise it would have done, had its adoption occurred subsequently to that decision; and at all events the decision on the particular point is a mere arbitrary declaration of a conclu-

sion, unaccompanied by any reasons in its support. and is therefore entitled to but slight consideration. But a very pregnant circumstance in this connection should not be overlooked,—a circumstance that distinguishes this case very widely from the Maryland case, and that is, that the party sought to be charged there had not in any manner estopped himself by receiving dividends or otherwise acting as shareholder. The case of McMahon v. Macy, 51 N. Y., 155, to which citation has been made, also differs from this, because in that case there was a responsible pledgor, and an absolute owner, answerable to the demands of creditors. The authorities cited by the court in that instance as showing parol evidence admissible to establish that stock was held as "collateral security" show nothing of the sort; they only annunciate the current doctrine that in equitable proceedings to redeem and the like, it is competent to show that a conveyance absolute on its face was only intended as a security for a debt; a ruling always put upon distinct equitable grounds, (O'Neill v. Capelle, 62 Mo. 202, and cases cited,) and was never intended to overthrow the salutary and fundamental rule which pointedly inhibits the introduction of parol evidence to vary or control a written contract. Granting, however, for the moment, such evidence to be admissible in this instance, how stands the case with the defendants? Their theory is, that they never owned the stock; that it belonged to the corporation, that they held it merely "in trust" "in escrow" as "collateral security." But what becomes of that theory when we advert to the statutory prohibition [subdiv. V, § 62, W. S. 300] that "no person shall be admitted to vote on any shares belonging or hypothecated to the corporation?" Is it not manifest that their former conduct in this regard, and their present theory utterly fail to correspond? This is a case where "acts speak louder than words;" where plausible theories go for nothing, when confronted by palpable facts. We can not impute to defendants either ignorance of, or a desire to violate the law, and so must conclude that they, by the act of voting the stock, represented themselves to the corporation, and were by the corporation regarded, as fully entitled to the privileges they claimed and exercised.

This being the case, they certainly can not be heard to gainsay their heretofore admitted title; to assert that "title, if their was a profit, and deny it if there was a loss;" Sanger v. Upton, *supra*. They are plainly estopped as towards the corporation; and if towards the corporation, then this estoppel will inure to the benefit of the creditors of the corporation who, in this proceeding, are subrogated to all its rights.

Again, it is well settled in this country that the capital stock of a corporation is a trust fund for the payment of all its debts, and that the directors are trustees of such fund This fund is

jealously watched by the courts, and they have sedulously defeated all devices whereby the directors have issued to themselves "paid-up stock;" all colorable transactions whereby stock has been taken in the name of a fictitious person or of a *feme covert*, or of an infant, (Thomp. on Stock, §§ 129, 182, 182, and cases cited,) and we see not why the same principle which forbids and thwarts all transactions of this nature should not step in and assert itself in the case at bar. The mischievous consequences are assuredly as great here as in the cases instanced, and the measures of relief afforded should be equally efficacious. For if it be an abuse of the trust fund for the trustees of a corporation to issue as paid-up stock, stock not paid up, we are at a loss to discover why a like rule should not apply here, and why stock issued for the purpose of allowing defendants to acquire control of a corporation, as they themselves have testified, should not be charged against them as stock regularly issued, and they held accountable accordingly.

As the result of these views we reverse the judgment and remand the cause.

NAPTON and HOUGH, J. J., concur.

HENRY, J., concurring:

I concur in the result, but do not agree that the facts would have rendered the defendants liable as stockholders to the railroad corporation.

NORTON, J., dissenting:

Plaintiff, who is a judgment creditor of the Memphis, Carthage, and Northwestern Railroad Company, and obtained execution on his judgment, which was returned *nulla bona*, is in this proceeding seeking to make the defendants, Seligman, liable as stockholders in said company under sec 736 R. S., 1879, which is as follows: "If any execution shall have been issued against any corporation, and there cannot be found any property or effects whereon to levy the same, then such execution may be issued against any of the stockholders to the extent of the amount of the unpaid balance of such stock by him or her owned." * *

I think it clear that, before an execution can issue under the above section against a stockholder, it must be shown that the stockholder proceeded against was the owner of stock on which there was an unpaid balance.

Ownership of stock may be acquired either by subscription of a person on the stock-books and the issue of stock to him, as the charter may provide, or by transfer on the books of the company, with its consent, by one person, the owner of stock, to another.

The evidence shows that the Seligmans, who are sought to be charged in this proceeding as the owners of 60,000 shares of unpaid-up stock, never subscribed for said stock on the books of the

company, and that said shares were never transferred to them by another person the owner thereof, on the books of the company and with its consent. It does show that the stock in question was issued to the Seligmans, not in virtue of any subscription made by them or any transfer made to them, but in virtue of a contract made between the corporation and Seligmans in 1872, under which defendants agreed, as financial agents of the company, to make certain advances of money to the company to enable it to complete its road; and in consideration of the advances made, and to be made, the company agreed to execute and deposit with the Seligmans its entire issue of first-mortgage bonds, and to deposit with them a majority of the capital stock authorized to be issued, the stock to remain in the control of the Seligmans for one year. It appears that, in pursuance of this contract, on the 22d of May, 1872, the board of directors of the company passed a resolution as follows: "That, in making negotiations for money with J. & W. Seligman & Co., certificates of a majority of the stock be issued to J. & W. Seligman & Co. to hold in trust for the period of twelve months, and that such certificates be signed by the president and secretary, with the corporate seal of the company affixed." On the books of the company also appears the following entry: "J. & W. Seligman; residence, New York; shares, 60,000 (held in escrow); amount of dollars, $6,000,000. May 20, 1872."

This evidence, while it fails to establish that Seligmans were the owners of such stock, does, on the contrary, establish the fact that they were not the owners, but simply the custodians of it as trustees. This contract, the resolution of the board of directors, and the entry on the stock-book, all indicate that, and nothing more; and by no process of reasoning known to me can an inference even be drawn from these facts that it was the purpose of either the Seligmans or the company to fasten upon the Seligmans a liability to the company for $6,000,000, when it is apparent that the object of the transactions between the parties was to secure through the Seligmans advancements of money to complete the road, for which they were to be made secure by the deposit with them of first-mortgage bonds and a majority of the capital stock. That the legislature did not intend by the section quoted above, and which gives origin to this proceeding, to make a mere holder of stock, who was not the owner, liable, is manifested by sec. 771, Rev. Stat., 1879, which declares that "no person holding stock in any such company, as executor, administrator, guardian, or trustee, and no person holding such stock as collateral security, shall be personally liable as stockholders of such company; but the person pledging such stock shall be considered as holding the same, and shall be liable as a stockholder accordingly; and the estates and funds in the hands of

such administrator, guardian, or trustee shall be liable in like manner and to the same extent as the testator or the ward or person interested in such fund would have been, if he had been living and competent to act, and held the stock in his own name.

This section clearly exempts from liability all persons holding stock in a fiduciary capacity. The exemption is absolute, and is not dependent on the fact that there is no *cestui que trust* to answer the liability under the last clause of the section.

A section of the statute of Maryland, of which sec. 771 *supra* of our statutes is a literal copy, has been construed in the case of Matthews *vs.* Albert, 24 Md., 527, and the construction therein given sustains the views above expressed. In that case the corporation itself issued the stock as collateral security, and the holder of the stock was sought to be made liable, and it was held that by virtue of said section he was exempt from liability. The stock in that case had been deposited with one Tiernan, who had loaned the company $2,000, as collateral security for the loan, and it was contended that the statute did not apply to a case when the company pledged the stock; but the court held otherheld otherwise, and observed: "That in our opinion his (Tiernan's) claim was for money loaned, and the stock transferred to him was held as collateral security for his loan, and so holding it he is not personally subject to any liability as stockholder, but is protected by the provisions of the act of 1852, ch. 338."

It appears from the evidence that the Seligmans voted the stock held by them at one or more elections for directors, and it is claimed that, having so acted, they are estopped both as to the company and its creditors from disputing the fact that they were the owners of the stock.

I think that the doctrine of estoppel does not apply in this case. To create an estoppel *in pais*, something more is required than the mere assertion (if voting the stock was an assertion by Seligmans) that they were the owners of the stock.

To establish an estoppel *in pais*, it must usually appear, first, that one party has made an admission or assertion inconsistent with the evidence proposed to be given or the claim offered to be set up; second, that the other party has acted upon such admission or assertion; and third, that such other party would be injured by allowing such admission or assertion to be disproved. Taylor *vs.* Zepp, 14 Mo., 482; Newman *vs.* Hook, 37 Mo., 207.

The doctrine of estoppel cannot be invoked by the company, because the evidence shows that the Seligmans, in voting this stock, did so with the consent of the company, and with full knowledge on its part that they were not in fact stockholders or owners of the stock; and it does not show that, in consequence of said act of Seligman, the company took any action which al-

tered its condition. Nor can the doctrine be invoked in this suit in favor of the creditor prosecuting it, because it does not appear that the debt of the company upon which his judgment was obtained, was contracted on the faith of said act, or even subsequent to the voting of the stock by Seligman.

For these reasons I do not concur in the opinion rendered.

[From Central Law Journal.]

FISHER *vs.* SELIGMAN.

Special to the Missouri Republican.

JEFFERSON CITY, February 6, 1882.—The following is the full text of the opinion rendered in the Supreme Court this morning by Chief Justice Sherwood in the case of Fisher against Seligman *et al.*, involving the old question of stockholders' liability, the subject of so many suits and so much litigation for the past five years:

The question in this case is as to the liability of the firm of Seligman & Co. of New York as holders of 60,000 shares of unpaid stock in the Memphis, Carthage and Northwestern Railroad Company.

In 1872 when that company had constructed its road-bed from Pierce City through Carthage and westwards into Kansas upon the basis of stock subscriptions of counties and towns for about $500,000, the firm of Seligman & Co. agreed to advance money for the iron for the first twenty-seven miles of the road if the company would deposit with them all their first mortgage bonds and a majority of the stock to remain for a year, and give them option to buy bonds at 70 cents and 2½ per cent. commission on the $500,000, making $125,000, whether sold or returned. Within the year the Seligmans voted their certificate of 60,000 shares, electing their board of directors; and again in 1874, when Joseph Seligman and the managers of the old Atlantic and Pacific Company were put in power. The usual result of default and foreclosure soon ensued, and the railroad is now incorporated in the St. Louis and San Francisco transcontinental line. The unsecured creditors and the holders of full paid stock have long endeavored to get protection from the courts, and in the first case that was decided by the Supreme Court, Griswold *vs.* Seligman, about a year ago, the opinion in which case was published at the time in the *Republican*, it was held that liability attached, and upon motion for rehearing the court adhered to its decision.

J. B. Fisher, appellant, *vs.* Jesse Seligman, James Seligman and David Seligman, executors of Joseph Seligman, deceased, respondents; appeal from the court of appeals.

In the case of Griswold *vs.* Seligman, 72 Mo., 110, the legal points involved in the present record were fully discussed, and the rulings there made are decisions of the case before us.

Inasmuch as these points have been re-argued in this instance, we have thought best to say something more concerning them. It was conceded in argument by counsel for defendants that if a party without any contract therefor assumes the attitude and privileges of a stockholder; assuming unwarrantably the exercise of such privileges; assuming to vote as a stockholder, that thereby he will take upon himself all the burdens and liabilities incident to such a position. But the contention is made that here there was a written contract, entered into between the corporation and James W. Seligman & Co., of which firm Joseph Seligman was a member. The record shows there was, indeed, a contract entered into, as contended, but of what avail is such a contract, when it contained no provision that the members of the firm should acquire the rights of stockholders? Is it not manifest that, this being so, the case must stand as if no such contract had been entered into? We cannot regard the matter in any other light. In a word, it is but the assertion of a truism to say that a contract which does not confer a right cannot be relied on to support or uphold the exercise of such a right, cannot be looked upon, so far as concerns that particular right, as any contract at all.

The case stands here, then, on this point, precisely as did Griswold's case, that of a party who votes as a stockholder, and when the endeavor is made to fasten upon him the customary liability arising from such conduct, attempts to shelter himself under a contract giving him the alleged right to vote as a stockholder, but which contract, when examined, is bare and barren of any provision. But even if the contract gave such a right to vote the stock, that contract expired by its own terms and limitations in one year from the reception of the stock, May 29, 1873, so that in any event the voting of the stocks, occurring, as it did, after Seligman ceased to have any right to hold the stock as trustee, such voting was wholly unauthorized, and must, therefore, be attended by those consequences to which we have heretofore adverted.

Second.—As to Joseph Seligman being estopped from denying that he is a stockholder, we hold, as we did before, that he is thus estopped. The fact that Seligman did not hold himself out to the world as a stockholder; the fact that Fisher, the creditor, at the time he gave credit, was not aware of Seligman's liability, is a matter altogether immaterial. If Seligman so conducted himself towards the corporation as to preclude him from denying,

as to the corporation, that he was a stockholder, by the same steps he estopped himself as toward any creditor who, under our law, succeeded and is subrogated to the corporate rights and assets. And there is nothing novel in this application of the doctrine of estoppel, subrogated as creditors are to the rights of a insolvent corporation. Among those rights will be included those acquired by reason of estoppel, as well as those acquired in the ordinary way.

The authorities cited in Griswold's case fully sustain and illustrate this. Nothing is more common in the law of estoppel than that a party, estopped as towards a particular person, is likewise estopped against all claiming under or in privity with such person. In instances like the present, the creditor claims under, represents, and stands in the shoes of the corporation, and, doing this, is entitled to advantage himself to the same extent as could the corporation. According to the authorities cited on a former occasion, already referred to, had Seligman been sued for calls, it would not have been in his mouth after assuming to act as a stockholder to resist such action by denying what he had before by his conduct asserted.

Third—Nor are our views changed as to the effect of section 9, Wagner's Statutes, p. 301. "No person holding stock in any such company as executor, administrator, guardian or trustee, and no person holding such stock as collateral security shall be personally subject to any liability as a stockholder of such company; but the person pledging such stock shall be considered as holding the same, and shall be liable as a stockholder accordingly, and the estates and funds in the hands of such executor, administrator, guardian or trustee, shall be liable in like manner and to the same extent as the testator or intestate, or the ward or person interested in such fund would have been if he had been living and competent to act and held the stock in his own name."

Joseph Seligman cannot be regarded as holding the stock in the capacity of "trustee," nor as holding it as "collateral security," within the meaning of that section. That section, according to the plain import of its terms, relates to stock already issued in ordinary course of business and which subsequently comes into the hands of either a trustee of some person laboring under a disablility as ex grs. a feme covert, or into the hands of the administrator of the estate of some decedent, or into the hands of a guardian of some infant, or lastly into the hands of a pledgee as "collateral security." In the last instance the "person pledging such stock shall be considered as holding the same and liable as a stockholder accordingly." This person is the pledgor and is "personally subject to * * * liability as a stockholder of such company." It is not pretended here that there is any per-

son who pledged this stock; that any person is liable thereon, and so it is not possible that the statute in question should apply.

In every case of pledging stock within the meaning of the statute there must be a stockholder whom the law, notwithstanding he has pledged his stock, still considers as occupying his original attitude and responsibilities, and, therefore, looks to him and holds him individually answerable. The bare statement of this case shows no such individual pledgor; no person against whom the creditor, if remediless in consequence of the insolvency of the corporation, could seek redress. He might recover judgment; he might have an execution issued and that writ be returned nulla bona; but when he had gone to such legal extremity he would, if a certain theory is to prevail, find that though stock in abundance has been issued, that though it had been pledged, that no one was responsible on that stock either as pledgor or as stockholder. But enough on this point.

Take another instance in this section, and the view becomes no better for Seligman. He is a trustee, it is said, but who is his *cestui que trust?* What "estates and funds in the hands of such * * * trustee" are there, which can be made liable in like manner and to the same extent as the * * * person interested in such fund would have been * * * competent to act and hold the stock in his own name?" Is it not plain that the statute, when speaking of the "estate and funds" of the person beneficially interested, does not and cannot refer either to the corporation or assets and funds thereof? If it does not refer, then, this of itself must conspicuously show both that there were no "estate and funds" in the hands of the alleged trustee, and that of consequence, he is not the sort of fiduciary whom the section exempts from liability.

That section treats of two, and only two, kinds of liability, one personal, that imposed on the pledger of stock; the other, that imposed on the estates and funds of him "who if * * * * competent to act would have 'held the stock in his own name.'" This record presents neither kind of liability, and as it does not there are no circumstances upon which section 9 can operate. This being the case, that doctrine is properly invoked here, which declares that a person who assumes the anomalous attitude of a trustee when representing no cestui que trust, becomes personally liable. This principle finds apt illustration in Johnson *vs.* Laflin, 5 Dill., 65. Britton bought stock with the bank's funds, and had it registered on the books as held as "Britton, trustee for the bank," and because there was no *cestui que trust*, who could become liable, the liability incurred was fastened on the party who unwarrantably assumed to act as a fiduciary.

Fourth. There have been many devices, many schemes, many cunningly-devised transactions, whereby men have sought to receive

every benefit and yet shirk every burden incident to the position of a stockholder, but such devices have generally come to naught. The courts have been sedulous in their endeavors to bring about such a result. We have no doubt that the matters set forth in the record are of the nature indicated, and we cannot better illustrate our views than by quoting the language of the learned judge of the court of appeals:

"A method of issuing bonds and selling no stock, but issuing paid-up stock, on which nothing has been paid, to the bondholder who is to vote the stock, and when called by a creditor to say that, though nothing has ever been paid on the stock, and no one is liable on it, that his voting was illegal, though it gave him control of the road, and that he merely held the stock as collateral, though it represented no indebtedness of anybody, no property, and nothing but a right to vote, would seem to be an ingenious evasion of the law."

So say we, and therefore reverse the judgment of the court of appeals and affirm that of the circuit court. Hough and Ray, JJ., concur; Henry, J., as heretofore; Norton, J., dissents.

T. A. SHERWOOD.

NORTON'S OPINION.

Following is the dissenting opinion filed by Judge Norton:

"This case, so far as the questions in it are concerned, is on all fours with the case of Griswold *vs.* Seligman, 72 Mo., 110. For the reasons given in my dissenting opinion in that case, which it is not necessary here to repeat, I do not agree to the opinion and judgment rendered in this case."

E. H. NORTON.

OFFICE SUPREME COURT U. S.
FILED
DEC 13 1882
JAMES H. McKENNEY, Clerk.

SUPREME COURT OF THE UNITED STATES.

EDWARD BURGESS,
Plaintiff in Error,

AGAINST

JESSE SELIGMAN, JAMES SELIGMAN and DAVID J. SELIGMAN, as Executors of Joseph Seligman, deceased,
Defendants in Error.

No. 136.
October Term, 1882.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF CASE.

This is a writ of error to the Circuit Court of the United States for the Eastern District of Missouri. The action was brought by the plaintiff in error against Joseph Seligman, James Seligman and Jesse Seligman, composing the firm of J. & W. Seligman & Company, to charge them with liability as stockholders for a debt of a railroad corporation of Missouri, named the Memphis, Carthage and Northwestern Railroad Company. Service was effected upon Joseph Seligman, who answered in due course, and the cause went to trial upon the issues raised by his answer. He is, therefore, hereinafter termed the defendant. Since the writ of error was sued out he has died, and the action has been revived in the name of his executors.

Pleadings.

The petition alleges that said railroad company was duly organized under the general railroad law of Missouri; that plaintiff,

upon November 5, 1874, duly recovered judgment against the company for $73,661.00, which is still unpaid; that the corporation was thereafter dissolved; that J. & W. Seligman & Company, at all these times, held stock therein to the extent of sixty thousand shares, and that there was remaining unpaid thereon a balance of one million dollars (fols. 5, 6).

The answer alleges that in 1872 the railroad company made a mortgage of all its property to secure bonds to the amount of eight hundred thousand dollars, of which four hundred thousand dollars were owned by Seligman & Company, and that six million dollars of the capital stock of said corporation "were deposited with Seligman & Company, on trust as "security for the payment of said bonds, to be held by said firm "for the purpose of enabling it to control said corporation and "to see that its affairs were honestly conducted and the earnings "applied to the payment of the bonds, and the interest thereon, "in order that the interests of the said firm might be protected "and the payment of their bonds secured, and for no other "purpose, said stock being the property of said corporation, to "be returned to it, and was only held in trust and as additional "security for the payment of said bonds, and for no other purpose" (fol. 8).

There was a replication denying the manner of the alleged deposit of the stock with Seligman & Company (fol. 10).

Substantially the only issue raised by the pleadings was, therefore, whether or not J. & W. Seligman & Company were liable as stockholders in the railroad company.

Findings of the Court.

The cause was tried and determined by the court without the intervention of a jury, the parties having filed with the clerk a stipulation in writing waiving the same (fol. 12). The court made special findings of fact. The findings are briefly as follows:

Upon March 14, 1872 the railroad company and J. & W. Seligman & Company entered into a contract in writing wherein it is provided, among other things, that certain considerable advances shall be made by Seligman & Company to the railroad company, and that, "in consideration of (such)

"advances, made and to be made," the railroad company agrees to execute and deposit with Seligman and Company their entire issue of first mortgage bonds, to wit, five millions of dollars ($5,000,000), and also agrees to deposit with Seligman & Company "a majority of the capital stock author-"ized to be issued, said stock to remain in the control of" Seligman & Company, "for the term of one year at least" (fols. 21, 22). On May 11, 1872, the directors of the company resolved that certificates for a majority of the capital stock be issued to Seligman & Company, "to hold in trust for the period "of twelve months" (fol. 26). On May 28th, 1872, a certificate for sixty thousand shares of the capital stock of the railroad company was issued to Seligman & Company. This certificate was in ordinary form and contained no restrictions or limitations whatever (fols. 27, 28). At the trial it was produced from the possession of the defendant (fol. 28). In the stock-book kept under the requirements of the statutes of Missouri appeared the names "J. & W. Seligman, New York," as stockholders (fol. 30). In the stock transfer book the entry was "J. & W. Seligman, "New York, 60,000 sixty thousand (shares) held in escrow" (fol. 31).

Shortly after the execution of the aforesaid contract between Seligman & Company and the railroad company an attorney saw and examined its provisions, told plaintiff of the contract, and that thereby Seligman & Company were to have control of the road and of the stock and bonds, and told him that it would be well to have a talk with the defendant before entering into any contract with the railroad company for construction of its road (fol. 33). Plaintiff called upon defendant, and, after stating that he understood that defendant was interested in the road, talked with him about the prospects of the work. Defendant advised plaintiff to go on with the work, and represented that there would be ample means to pay therefor by getting hold of the local bonds subscribed by counties along the line of the road (fols. 34, 35).. Plaintiff, thereafter, entered into a contract for construction with the company and did a large amount of such work (fols. 36, 51, 65).

At the first annual stockholders' meeting, held in March 1873, the stock so held by Seligman & Company was voted upon under a written proxy for that purpose executed by said firm (fol. 37).

In the fall of 1873 Seligman & Company, together with other bondholders held a meeting at which one James Baker of St. Louis was present by special invitation. Arrangements were then made by which said Baker, as the representative of the bondholders, should obtain for them control of the road by means of the stock so held by Seligman & Company. Afterward, in execution of this arrangement, the defendant signed a proxy to vote upon this stock and sent the same to Baker. This proxy was delivered to one Blow for use at the next annual election for directors in March, 1874. At that meeting the stock was voted upon by Blow under said proxy. Baker, as the representative of all the bondholders, then named or produced the ticket for directors which was elected (fols. 38, 39). At this election said Baker, as the representative of Seligman & Company and the other bondholders, was elected a director, and the defendant also was made a director through the use of the proxy signed by him. The result of this election, with the names of the directors elected, was spread upon the corporate book containing the proceedings of the directory. The defendant knew of his election as such director (fol. 39). Thereafter, on October 1, 1874, the directors resolved that the road should be turned over to the trustees for the bondholders (fol. 43). In December, 1874, the road was sold under the mortgage and purchased by a committee of bondholders. Bonds were then outstanding to the amount of $863,000. Of these $416,500 were held by Seligman & Company (fol. 44).

In November, 1874, plaintiff obtained judgment against the railroad company for $73,661 (fols. 46, 50). In December, 1874, the corporation was dissolved (fol. 45).

Upon the foregoing facts the Court held that the defendant should have judgment (fol. 65), and plaintiff has removed the cause to this Court by writ of error (fol. 71).

ASSIGNMENT OF ERRORS.

The errors assigned by plaintiff in error are that,

1. The Court rejected an offer by him to prove that, shortly after the election of directors of the railroad company in March 1873, he had a conversation with two of the di-

rectors who informed him that the Seligman stock had been voted upon at that election (fol. 69).

2. Upon the facts found, the Court erred in its conclusion of law that defendant should have judgment (fol. 67).

POINTS.

FIRST POINT.

This suit, being brought against the defendant for an alleged liability as shareholder, is properly brought under the local practice.

The statutes of Missouri provide that "if any company "formed under this act dissolve, leaving debts unpaid, suits "may be brought against any person or persons who were "stockholders at the time of such dissolution without "joining the company in such suit." (1 Wagner's Statutes, 293, sec. 20). The railroad company has been dissolved within the meaning of this statute (fol. 45).

SECOND POINT.

The Missouri Statute invoked by the defendant, does not exempt the defendant, but on the contrary makes clear that he is subject to whatever liability is imposed under the general rules of law.

Defendant in his answer, apparently, claims exemption from liability under the following section of the statutes of Missouri:

"No person holding stock in any such company as executor, administra-
"tor, guardian or trustee, and no person holding such stock as collateral

"security shall be personally subject to any liability as a stockholder of such "company, but the person pledging such stock shall be considered as hold- "ing the same, and shall be liable as a stockholder accordingly, and the "estates and funds in the hands of such executor, administrator, guardian "or trustee shall be liable, in like manner and to the same extent, as the "testator or intestate, or the ward or person interested in such fund would "have been if he had been living and competent to act, and held the stock "in his own name" (1 Wag. Stat., p. 301, Sec. 9.)

1. The highest court in Missouri has decided that this statute does not include one in the position of the defendant within its description of those exempted from personal liability as shareholders.

Since the decision of this case at the Circuit, the Supreme Court of Missouri has construed this section in the case of Griswold vs. Seligman (72 Mo. 110). That was an action upon the same facts now involved by another creditor of the same railroad corporation against the defendant in this action to charge him with the same liability as that now asserted. The point was there made that the case came within the section cited above.

The decision of the Court is expressed in the syllabus as follows: "Section 9, p. 301, Wag. Stat., in relation to rail- "road companies provides that no person holding stock in "any such company as collateral security, shall be person- "ally subject to any liability as a stockholder of such com- "pany; but the person pledging such stock shall be consider- "ed as holding the same and shall be liable as a stockholder "accordingly. *Held*, that this section has no application to "stock which has not been issued in the usual course of "business, and therefore does not exempt from liability a "person holding as collateral security unsubscribed stock "issued to him by the company."

The Court said, in discussing the section: "The evident purpose and "policy, the fundamental idea of the section being discussed as well as "others in *pari materia* both constitutional and statutory, require that the "creditors of the corporation should be abundantly secured against loss; "and this end was sought to be accomplished by providing that some per- "son or estate should always be ready to respond to the demands of creditors. "It seems too plain for discussion that any other construction would defeat "the legislative purpose. If these views be correct, if the statute ex- "empts only those classes of persons which it expressly designates, "the defendants falling in neither of such classes, not being executors or "administrators of some deceased stockholder, nor guardian or trustees of "some one laboring under the previously mentioned disabilities, it can "follow only that the case stands here for determination as if the section

"under consideration did not exist. Here there was no pledgor, and, "consequently, could be no pledgee within the meaning of the statute, "since it is little less than absurd to say that a corporation could be its own "stockholder.

The Court further say: "Again, it is well settled in this country that the capital stock of a corporation is a trust fund for the payment of all its debts. * * * * This fund is jealously watched by the Courts, and they have sedulously defeated all devices whereby the directors have issued to themselves paid-up stock. * * * * And we do not see why this same principle which forbids and thwarts all transactions of that nature, should not step in and assert itself in the case at bar. The mischeivous consequence is assuredly as great here as in the cases instanced, and the measure of relief afforded should be equally efficacious. * * * * We are at a loss to discover why stock issued for the purpose of allowing defendants to acquire control of a corporation, should not be charged against them as stock regularly issued, and they held accountable accordingly."

This decision has been reiterated by the same court in Fisher vs. Seligman, unreported.

2. This construction of the Missouri statute by the highest court of that state is, under familiar rules, conclusive upon this court.

"This court follows the adjudications of the highest "court of the state, in the construction of its statutes. Its "interpretation is accepted as the true interpretation, "whatever may be our opinion of its original soundness."

Fairfield vs. County of Gallatin, 100 U. S., 47, 52.

And in the very recent case of Moores vs. National Bank, 104 U. S., 625, it has been *held* that "the con- "struction given by the supreme court of a state to a "statute of limitations of the state will be followed by "this court in a case decided the other way in the Circuit "Court before the decision of the state court.

The case of Pease vs. Peck, 18 How., 595 (1855), is not inconsistent with this rule. The question there was whether or not a statute had been legally passed, not what was the proper construction of an unquestioned statute. And in any event, upon the question now involved, Pease vs. Peck, must be deemed to be controlled by Moores vs. National Bank (*Supra*).

There are, of course, cases involving questions of muni-

cipal bonds in which this court has held itself not bound to follow State decisions as to the validity of the bonds.

Town of Venice vs. Murdock, 92 U. S., 501.
Town of Pine Grove vs. Talcott, 19 Wall., 677.
Olcott vs. Supervisors, 16 Wall., 669.

These cases are placed upon the ground that the questions involved were general, not statutory. They are not applicable here. In Griswold vs. Seligman, the precise question considered was whether or not the statute applied to the facts there presented. The question was purely one of statutory construction.

THIRD POINT.

Under well-settled rules, stockholders are liable to creditors to the extent of unpaid stock held by them.

The holders of unpaid shares of stock are liable thereon up to the par value of the shares, and their liability is a trust fund for the benefit of creditors of the corporation.

In Wood vs. Dummer, 3 Mason, 308, 311 (1824), it was first held (Story J.) that "the capital stock is a trust fund for the payment of all the debts of "the corporation." Since then, this doctrine has been fully sanctioned by this court, as well as by the American courts generally.

In Sawyer vs. Hoag, 17 Wall., 610, 620 (1873) the court said (Miller J.): "Though it be a doctrine of modern date, we think it now well established "that the capital stock of a corporation, especially its unpaid subscriptions, "is a trust fund for the benefit of the general creditors of the corporation. "And when we consider the rapid development of corporations as instru "mentalities of the commercial and business world in the last few years, "with the corresponding necessity of adapting legal principles to the new "and varying exigencies of this business, it is no solid objection to such a "principle that it is modern, for the occasion for it could not sooner have "arisen."

In Upton vs. Tribilcock, 91 U. S., 45, 47 (1875), the court said (Hunt J.): "The capital stock of a moneyed corporation is a fund for the payment of "its debts. It is a trust fund of which the directors are the trustees. It is "a trust to be managed for the benefit of its shareholders during its life, "and for the benefit of its creditors in the event of its dissolution. This "duty is a sacred one and cannot be disregarded. Its violation will not be "undertaken by any just minded man, and will not be permitted by the "courts. The idea that the capital of a corporation is a foot-ball to be "thrown into the market for the purposes of speculation, that its value may

"be elevated or depressed to advance the interests of its managers, is a mod-
"ern and wicked invention."

In Sanger vs. Upton, 91 U. S., 56, 60 (1875), the court said (Swayne J.):
"The capital stock of an incorporated company is a fund set apart for the
"payment of its debts. It is a substitute for the personal liability which
"subsists in private copartnerships. When debts are incurred, a contract
"arises with the creditors that it shall not be withdrawn, or applied other-
"wise than upon their demands, until such demands are satisfied. The
"creditors have a lien upon it in equity. If divided they may follow it as
"far as it can be traced and subject it to the payment of their claims, ex-
"cept as against holders who have taken it *bona fide* for a valuable consid-
"eration and without notice. It is publicly pledged to those who deal with
"the corporation for their security. Unpaid stock is as much a part of this
"pledge, and as much a part of the assets of the company, as the cash
"which has been paid in upon it. Creditors have the same right to look to
"it as to anything else, and the same right to insist upon its payment as
"upon the payment of any other debt due to the company. As regards
"creditors there is no distinction between such a demand and any other
"asset which may form a part of the property and effects of the corpo-
"ration."

To the same effect are:

Chubb vs. Upton, 95 U. S., 665.
Hatch vs. Dana, 101 U. S., 205.
Hawley vs. Upton, 102 U. S., 314.
County of Morgan vs. Allen, 103 U. S., 498.

FOURTH POINT.

This liability is absolute and fixed, and cannot be made dependent upon any condition, and cannot be released.

As against the claims of creditors, there can be no agreement to become a shareholder without assuming this liability, and the liability cannot be released save for full value.

In Burke vs. Smith, 16 Wall, 390, 395 (1872), the court said (Strong J.):
"It has been settled by very numerous decisions, that the directors of a com-
"pany are incompetent to release an original subscriber to its capital stock,
"or to make any arrangement with him by which the company, its credi-
"tors, or the State shall lose any of the benefit of his subscription. Every
"such arrangement is regarded in equity not merely as *ultra vires*, but as a
"fraud upon the other stockholders, upon the public, and upon the creditors
"of the company. Conditions attached to subscriptions which, if valid, lessen
"the capital of the company, thus depriving the State of the security it exacted
"that the railroad would be built and diminishing the means intended for the
"protection of creditors, are therefore a fraud upon the grantor of the

"franchises, and upon those who may become creditors of the corporation. "They are also a fraud upon unconditional stockholders, who subscribed "to the stock in the faith that capital sufficient would be obtained to com- "plete the projected work, and who may be compelled to pay their sub- "scriptions, although the enterprise has failed and their whole investment "been lost. It is for these reasons that such conditions are denied any effect."

In Sawyer vs. Hoag, 17 Wall., 610, (1873), it was *held* that "the trust can- "not be defeated by a simulated payment of the stock subscription, nor by "any device short of an actual payment in good faith."

In Upton vs. Tribilcock, 91 U. S., 45, (1875) and Webster vs. Upton, 91 U. S. 65, 67, 68, 75, (1875), the original subscription was made upon condition that the liability of the stockholders should be limited to an amount less than the par value of the stock. It was *held* that the subscription was binding, but that the condition was unavailing as against creditors.

To the same effect are Hawley vs. Upton. 102 U. S., 314, and Union Mutual Ins. Co. vs. Stone Co, 97 Ill 537,

FIFTH POINT.

This liability attaches to the individual in whose name shares of stock actually stand, no matter in what capacity or under what circumstances such shares may be held.

1. This is the rule where the shares are actually owned by the one in whose name they are registered, whether there was an actual contract of subscription or not, and whether the holder took the shares directly from the corporation or by transfer from another.

In Upton vs. Tribilcock, 91 U. S., 45, (1875,) the defendant had subscribed for stock under an agreement that twenty per cent. should be paid in cash, but that, as to the balance, the stock was unassessable and need not be paid. The court *held* (Hunt J.) that "the original holder of stock "in a corporation is liable for unpaid instalments of stock without an ex- "press promise to pay for them; and a contract between a corporation or its "agents and him, limiting his liability therefor, is void both as to the cred- "itors of the company and its assignee in bankruptcy." The court said: "The acceptance and holding of a certificate of shares in an incorpora- "tion, makes the holder liable to the responsibilities of a shareholder (p. "47). * * A promise to take shares of stock imports a promise to pay for "them. The same effect results from an acceptance and holding of a cer- "tificate" (p. 48).

In Sanger vs. Upton, 91 U. S., 56, 63 (1875), the proof was that the defendant held a blank certificate of stock, upon which she had paid twenty per

cent. to the company, and also that the stock stood in her name upon the company's books. The point was urged that no contract of subscription was shown. The court (Swayne J.) said: "The only question was whether "the defendant owned the stock. No one else claimed it. The certificates "were issued and delivered to her. They belonged to her. They were the "muniment of her title. She could have filled the blanks with her name "whenever she thought proper. She had paid to the company all that "was then payable, and subsequently received a dividend. Her name "was placed upon the stock list. These facts were conclusive against "her. She was estopped from denying her ownership. She could not "assert her title if there were a profit, and deny it if there were a loss The "certificates showed the par of the stock and the amount to be paid. Upon "receiving them, the law implied an agreement on her part to respond for "the balance whenever called upon in any lawful way to do so. No spe- "cial, express agreement, written or oral, was necessary. The former was "as obligatory as the latter could have been. It would be a mockery of "justice to permit such an objection to prevail."

In Webster vs. Upton, 91 U. S., 65 (1875), the principle was carried one step further. One Hale had subscribed for stock upon the same terms as Tribilcock, and the word "non-assessable" had been stamped upon the certificates by the company (p. 71). Thereafter Webster purchased the same and had them transferred to his own name. The court said (Strong J.), upon a review of the authorities, that "the transferee of stock in an incorporated "company is liable for calls made after he has been accepted by the company "as a stockholder, and his name has been registered upon the stock books as "a corporator; and, being thus liable, there is an implied promise that he "will pay calls made while he continues the owner" (p. 70). It was accordingly *held* that the transferee was subject to the same liability as the original holder.

In Chubb vs. Upton, 95 U. S., 665 (1877), the court (Hunt, J.), adopts the rule that a person receiving a certificate for a certain number of shares of stock, of a given sum per share, thereby becomes liable to pay the amount thereof when called upon by the corporation or its assignee. It said further: "A series of objections is to the admission of various pieces "of evidence introduced to show that the defendant was a stockholder, "* * * The importance of this evidence was at an end when the certi- "ficate of shares was afterward given in proof, and when it was expressly "admitted by the defendant that he held the same; that he made payments "thereon, and acted as a holder of shares in the company. It is not neces- "sary, therefore, to enquire whether or not the evidence was properly ad- "mitted."

2. This is also the rule when the shares are held merely as collateral.

In Pullman vs. Upton, 96 U. S., 328, (1877) the defendant held the stock as collateral security but had transferred it to his own name. The court *held*, in accordance with the foregoing cases, that a person to whom shares had been transferred upon the books was liable as a shareholder, whatever might be his arrangement with the previous holder.

In National Bank vs. Case, 99 U. S., 628, (1878) the facts were that a national bank had taken stock in another bank as security and caused it to be transferred to itself. The court said (Strong J.): "It is thoroughly established "that one to whom stock has been transferred in pledge or as collateral "security for money loaned, and who appears on the books of the corpora- "tion as the owner of the stock, is liable as a stockholder for the benefit of "creditors. * * * For this several reasons are given. One "is that he is estopped from denying his liability by voluntarily holding "himself out to the public as the owner of the stock, and his denial of "ownership is inconsistent with the representations he has made; another "is that by taking the legal title he has released the former owner; and a "third is that after having taken the apparent ownership and thus be- "come entitled to receive dividends, vote at elections, and enjoy all the "privileges of ownership, it would be inequitable to allow him to refuse "the responsibilities of a stockholder."

3. This would seem also to be the rule where the shares are registered in the name of one individually naming him as "trustee," unless the liability is relieved by some statutory provision.

The Missouri Statute invoked by defendant was intended to relieve one who was an express trustee for another from personal liability, upon the assumption that such liability would exist independently of the statute, but as we have seen it does not apply to one in the defendant's position. To the same effect are numerous statutes in other States, and § 5152 U. S. R. S., relieving an express trustee from personal liability and subjecting the trust estate to such liability. In England only executors taking shares of stock under proper authority are released from personal liability. In Scotland, under the unlimited liability of bank shareholders, all

trustees holding shares are personally liable, but they are reimbursed out of the trust estate. . (See Cunningham vs. Liquidation City of Glasgow Bank, 6 Sessions Cases, 1333–5.)

4. This is also the rule ~~generally~~ universally where the shares are registered in the name of one individually, who, in fact, holds them under a secret trust for another. (*See* Thompson on Liability of Stockholders, §§ 177 and 178, and cases there cited, and also cases cited below.)

See also Mitchells Case LR. 9 Eq. 383-6
Slover v. Slack 30 N.Y. 64
Shellington v. Howland 53 N.Y. 371
Holyoke M.R. v. Burnham 11 Cush. 183

5. This is the rule also, where the one in whose name the stock is registered, in fact holds the shares merely as the nominee or representative of the corporation, or as security from the corporation for its debt to him.

Such a state of facts does not alter the liability of one who has had the stock placed in his own name.

> "Assuming that a corporation or joint stock company has the power to "issue its unissued shares in pledge to secure a debt, what effect does this "have upon the relation of the pledgee to the creditors of the company? "Does he become charged with the general responsibilities of a share- "holder? This question may doubtless be answered yes or no, according "to surrounding circumstances. If the pledgee has been placed upon the "register of the company as the absolute owner of a given number of "shares on which nothing has been paid, and he negligently suffers his "name so to remain, manifestly he will be estopped, as against subsequent "creditors, from denying that he is a shareholder. Moreover, if he votes

" in respect of his shares at meetings of the company and otherwise exer-
" cises in the affairs of the company the rights of a shareholder, a like
" estoppel will arise against him."

Thompson on Liability of Stockholders, Sec. 224.

The above statement of the law is contained in a chapter which has been expressly approved by this court, (National Bank vs. Case, 99 U. S., 628). These views are sustained by authority.

In Davidson's Case, 3 De G. & Sm., 21 (1849), an agreement was made between Davidson and the company that certain shares should be allotted to Davidson, but that he should receive nothing and contract no liability by reason thereof, and should re-transfer such of them as he could not dispose of to the company. *Held* that Davidson was liable to contribute. The court said: " The learned counsel contended that it was not proved " that any person had been in fact misled; but the intention was, in my " judgment, to deceive. It has not been proved or alleged that strangers " did not, and I think it reasonable to assume that strangers did, become " shareholders after the transaction. If they did so, it seems to me like- " wise right to presume that they became shareholders in the belief that it " was truly what it was ostensibly."

In Chapman and Barker's case, L. R., 3 Eq., 361 (1867), certain shares were placed in the names of Chapman and Barker as trustees for the company. Chapman and Barker had no interest in the shares, deposited the certificates with the company, and the company drew all dividends itself, Chapman and Barker appeared upon the register as the owners. The statute (25 and 26 Vict., Ch. 89, Sec. 25), provided that a register of the members must be kept by the company; also, that no notice of any trust should be entered upon the register (Sec. 30), and that all persons should have access to the register (Sec. 32). The court said (Page Wood V. C.): " The creditors have a right to take as their debtor everybody who is " properly upon the register, including the trustees for the company. " But creditors do not, therefore, obtain the right of insisting upon retain- " ing as their debtor a person whose name has been placed there by fraud " or wrong, and ought never to have been there at all. An important " question might arise as to how far a person after he knows that his " name has been wrongly placed upon the register, may by acts of " acquiescence—such as accepting a dividend or the like—be held to be " liable. It is like any other case; he cannot approbate and reprobate. " If for his own convenience he adopts the act, he must be liable for the " consequences of the act." The question whether "he has or has not " adopted it, is wholly one of degree and of evidence for the court." The court goes on to say that as Chapman and Barker had been placed with their own consent in a position of responsibility to the creditors. they must so remain. The fact that they would be entitled to indemnity from the company did not concern the creditors at all, for they had "agreed " that their names should be placed upon the list for the purpose of in- " forming the world that they were the owners of the shares."

In Ind's case, L. R. 7 Ch., 485 (1872), shares were transferred to Ind as trustee, or nominee, for the company. He executed a blank transfer and deposited it with the company. The court said (Mellish L. J.) that

while Ind was entitled to indemnity from the company, still "the substance "of the matter is that Mr. Ind has agreed to take fifty shares as between "him and the creditors of the company; he has been registered with his "own consent as to those shares, and therefore he is properly on the list."

While this and the preceding cases were decided under the companies' act (25 and 26 Vict.), they are, nevertheless, applicable to the present case. That act provided, that a register of stockholders shall be kept by the company, and that no notice of any trust shall be entered upon the register. The statutes of Missouri provide (*supra*, pp. 18, 19) that a book containing a list of the stockholders shall be kept by the company, and, as has been shown (*supra* 5–6), it is conclusively held that the present was not a case of trust. The present case is, therefore, in substantially the same position, so far as statutory provisions are concerned, as cases under the companies act.

In Allibone vs. Hager, 46 Pa. St., 48 (1863), the defense was made in an action by a judgment creditor, that defendants subscribed for the unpaid stock merely as agents for the corporation, and under an agreement between them and the corporation that the stock should be sold by the latter whenever it desired or needed to raise funds. The Court said (Thompson J.): "The act requires the stock to be subscribed for and by persons "who are to become members of the company, and the certificate of in- "corporation shows that all the original stock was subscribed by and for the "defendants in this suit. Whatever might be the law between them and "the corporation, as between them and the public the certificate is con- "clusive. I cannot agree, therefore, that creditors have only the rights and "equities of the corporation as against the stockholders. They have the "rights which the statute gives; no more, no less. The certificate dis- "closes the extent of the capital stock, and the statute renders all the "subscribers to it liable for its payment when creditors call." This case has been approved by this Court in Sanger vs. Upton, 91 U. S., 60.

In Wheelock vs. Kost, 77 Ill., 296 (1875), it was agreed between Wheelock and a certain national bank that fifty shares of its stock should be issued to him by the bank as collateral security for a loan to it. This was an action by creditors to hold him as a stockholder. The court said (Scott J.): "Whatever relation appellant may have sustained to the cor- "porators of the bank, it seems clear that, as to its creditors he occupied "the position of a stockholder, and must bear all the burdens that relation "imposed. The stock had in fact been transferred to him; it stood in his "name as owner, and he availed of the dividends it earned. Having vol- "untarily assumed the relation of stockholder, it makes no difference that "he may have done it with a view to assist the bank in its credit or other "wise. The legal title to the stock was in appellant by his own procure- "ment, although the equitable title may have been in other parties; but it "would be a singular doctrine to hold that the creditor should seek out "the equitable owner against whom to enforce his claim. Primarily he

" may proceed against the party in whom is the legal title to the stock." This case has been strongly approved by this court in Pullman vs. Upton, 96 U. S., 328, and National Bank vs. Case 99 U. S., 628.

To the same effect is Griswold v. Seligman (Supra)

SIXTH POINT.

As against creditors, the same liability is incurred by any one who acts as a shareholder, even without actual registry, or without actual ownership as against the corporation or others.

FIRST. THIS GROUND OF LIABILITY IS ESTABLISHED BY AUTHORITY.

1. This rule has been fully established in this Court.

The cases cited before on pages 10 and 11, fully uphold this ground of liability, as well as ~~upon~~ the grounds before stated. We refer especially to the following cases:

Upton vs. Tribilcock, 91 U. S., 45.
Sanger vs. Upton, 91 U. S., 56, 63.
Webster vs. Upton, 91 U. S., 65.
Chubb vs. Upton, 95 U. S., 665.
National Bank vs. Case, 99 U. S., 628

While these cases involved various states of facts, it should be observed that the grounds of decision and the rules laid down were not dependent upon the special facts, but are equally applicable to all cases of assumption of the relation of stockholder.

2. The same general principle is fully sustained by cases decided in other courts.

In Cromford Company vs. Lacey, 3 Young & J., 80 (1829), the act of incorporation of a company recited that the proprietors had complied with certain formalities necessary to render them liable to calls. In fact such formalities had not been complied with. This was an action for calls. The defendant, with knowledge of the misrecital in the statute, had paid previous calls. It was *held*, that he could not now question the validity of the act on the ground of the misrecital. Alexander L. C. B., said, "The "act passed with that which, for the argument, I assume to be a misrecital, "and in obedience to the act, and treating it as if it were unobjectionable,

"the defendant pays several calls, claims the benefit and takes advantage "of the act, and by so doing gives a color to it. It is impossible to say "that many individuals may not have been induced to subscribe under "the influence of his example. He has acted and held himself out to the "world as a proprietor, and after such conduct cannot now say he is not a "proprietor, nor question the validity of the act of parliament which by "his conduct he has adopted." Garrow B., said that the defendant could not be allowed, "so long as the concern was prosperous, to hold "himself forth to the world as a proprietor and take advantage of the act," and then withdraw when it seemed likely to be unprofitable.

In Ellis vs. Schmoeck, 5 Bing., 521 (1829), defendants had purchased the scrip of a mining company originated in fraud, and had attended one meeting of the company. But they never signed the partnership deed, were innocent of the fraud, and transferred their scrip before this action was begun. The action was for goods furnished to the company after defendants had purchased their scrip. *Held* (Park, J.), that defendants were liable upon the ground that they had held themselves out to the world as partners. This case is approved in Sanger vs. Upton, 91 U. S., 56, 64.

In Sheffield Railway Co. vs. Woodcock, 7 M. & W., 574, (1841), the statute required transfers of shares to be by deed. A transfer was executed by the seller with a blank for the purchaser's name and stating the consideration untruly, but the purchaser afterward signed and transmitted to the company a proxy paper describing himself as the proprietor of the shares. This was an action for calls against the purchaser who set up that the transfer was invalid. The company claimed that he was estopped from setting up this defense. The court, said (Parke, B.): "The defendant held out false colors to induce the company to register "him as a proprietor, and therefore to bring this action against him, It is "a universal rule of law that where a party makes a representation to "another, whereby the situation of the latter is altered, he is bound "thereby."

In Cheltenham Ry. Co. vs. Daniel, 2 Eng. Ry. Cas., 728 (Q. B., 1841), defendant sent to the company scrip certificates which had been issued to another person, claiming to be registered as a proprietor in respect thereof. He accordingly received from the company a receipt for the scrip certificates, with a notice that they would be exchanged for shares on demand. Defendant never received the shares. No regular transfer was ever made by him or his predecessor, or any memorial of transfer entered as required by statute. *Held*, that, notwithstanding the provisions of the act necessary to make him a proprietor had not been complied with, the defendant by his representation and claim to be registered had precluded himself from taking advantage of such objection, and was therefore liable for the calls on his shares. The court said (Denman C. J.): "It is impossible to get "over the authority of Sheffield Railway Co. vs. Woodcock (*supra*) "that a party cannot, by his own conduct, change his liability at his "pleasure. In my opinion the judgment there clearly settles this case; "all the machinery which the legislature renders necessary to constitute "a member is in this instance dispensed with by the conduct of the "grantees."

In Maguire's Case, 3 DeG. & S., 31 (1849), shares had been placed in

Maguire's name by his father, without his knowledge. Maguire had demanded and accepted proprietors' tickets. *Held*, that he could not be heard to deny that he was a proprietor.

In *Ex parte* Besley, 2 Macn. & G., 176 (1850), Besley had requested that he be allowed to withdraw from the provisional committee of a projected corporation. No shares were allotted to him, but he afterward attended meetings and paid sums of money in pursuance of resolutions passed at the meetings toward liquidating indebtedness of the company. *Held*, (Cottenham C.), that he must contribute. The court said: "By his "acts he recognizes circumstances which under any view of the law "would render him liable to contribute, and I do not know that anything "can be more dangerous than when a man's overt acts show an acknowl- "edgment of a liability, to permit him to say that he acted under a false "impression of the law."

In Chase vs. Merrimack Bank, 19 Pick., 564, 569 (1837), an individual had been elected a member of a parish, had attended the parish meetings and voted and been elected a trustee. In an action to hold him liable for debts of the parish he defended upon the ground that he had not filed the certificate of membership required by statute. *Held*, (Wilder J.), that he could not, after the performance of the acts above stated, deny his membership.

In Holyoke Bank vs. Burnham, 11 Cush,, 183 (1853), stock registered in the name of A was shown to be held as collateral to an indebtedness of B. The court said (Dewey J.): "It seems to us quite clear that as regards the cred- "itors of the corporation the defendant is to be considered as an absolute "owner of the eleven shares of stock standing in his name. Such is the "form of the certificate he received and such the relation he assumed to the "other stockholders and to the public. Assuming the relation he takes with "it all the liabilities attached thereto." This case is approved in Pullman vs. Upton, 96 U. S., 331.

In Lane vs. Brainard, 30 Conn., 565, 579 (1862), defendant had made a subscription subject to a condition precedent. Thereafter, although the condition had not been fulfilled, he accepted the office of director. *Held*, in an action by a creditor, that defendant could not thereafter deny that he was a stockholder.

In Adderly vs. Storm, 6 Hill, 624 (1844) stock was pledged as collateral security and transferred to the name of the pledgee. The court said (Bronson J.): "The legislature has provided for the creation of the stock, "prescribed the mode in which it may be transferred, and conferred cer- "tain rights and liabilities upon the 'stockholders.' After the defendants "had once become the legal owners they could only throw off the liabili- "ties incident to that relation by transferring the stock. Until that was "done they continued to be 'stockholders' within the meaning of the statute. "If we depart from the terms of the law and inquire into the equities "which may exist between the stockholder and some third person it can- "not fail to embarrass creditors in seeking a remedy for the wrongs which "may be done by the corporation. If creditors must look beyond the le- "gal title they can never know against whom to proceed." This case is approved in Pullman vs. Upton, 96 U. S., 331.

In Matter of Reciprocity Bank, 22 N. Y., 9, 17 (1860) the corporation had accepted a surrender of certain shares, and afterward reissued them. The

persons to whom they were reissued caused themselves to be registered as stockholders. They now sought to escape liability upon the ground that the corporation had no power to accept the surrender. The court said (Comstock J.): "If a party makes an actual purchase of shares, whether "from the bank or an individual holder, and voluntarily allows himself "in this manner to be represented to the world as a stockholder, he must "take the responsibilities of that situation. He comes within the terms "and the policy of the act. His title may be imperfect. Equities may "exist between him and other parties. The shares may be in dispute. They "may be claimed by some one else in hostility to his own right. The stat- "ute has no regard to such questions. The person who has caused or al- "lowed his title to be registered on the books cannot deny the truth of "that representation and disavow the ownership when it ceases to be a "benefit and comes to be a burden."

In Hayes vs. Pittsburg R. R. Co. 38 Pa. St., 81 (1860) it was *held* (Strong J.), in an action for calls, that a subscription might be proved by showing acts of participation in the company's affairs, such as voting, acting as directors, judges, etc., and active exertions to obtain a municipal subscription on the faith of a subscription certified to have been made by the parties so acting. "Such acts are not merely evidential of an original "subscription, but are conclusive, amounting to an estoppel upon the "parties against denying it."

In McHose vs. Wheeler, 41 Pa. St., 32 (1863) the defendants had acted as directors and participated in the management of the company. They sought to defend against the claim of a creditor upon the ground that they had never authorized any subscription to the stock. The court stated the rule to be that "if a person named in the certificate and charter "as a member afterward acts as such, or upon discovering the use of "his name does not promptly disavow it, he cannot evade liability as "a member by showing that he was not one in fact and never paid in "any stock; the disavowal must be immediate, or he will be deemed as "ratifying the relation as to creditors."

In Haywood Road Co. vs. Bryan, 6 Jones Law, 82 (1858) the statute required a certain payment to be made at the time of subscribing. This action was for a call. Defendant set up that he had not made the preliminary payment required by statute. It was shown that defendant had participated in meetings and in managing the affairs of the company. *Held*, that he was estopped to deny that he was a stockholder.

In Dayton R. R. Co. vs. Hatch, 1 Disney, 84, 97 (1855), the defense was made that a subscription was by its terms to be binding only upon a condition precedent. The subscriber, although the condition was not fulfilled, participated in the management of the company. The Court said (Gholson J.): "the paying of the first instalment of stock, the voting the "whole stock at an election of officers, not to speak of acting as the chief "officer of the company under that election, must be deemed sufficient to "conclude a party from denying that he ever was a stockholder. Such "acts must be considered as having effect and influence on the operations "of the company and the conduct and rights of other stockholders, and "bring the case within the very principle governing an equitable or parol "estoppel."

To the same effect are the following cases:

Perring vs. Hone, 4 Bing., 28.

Doubleday vs. Muskett, 7 Bing., 110.
Harrison vs. Heathorn, 6 M. & G. 81, 134.
Hull Flax Co. vs. Wellesley, 6 H. & N., 38, 54.
London Ry. Co. vs. Graham, 2 Eng. Ry. Cas., 870.
Straffan's Case, 1 De G. M. & G., 576, 595.
Hoare's Case, 2 Johns. & H., 229.
Holyoke Bank vs. Goodman Ropes Co., 9 Cush., 576.
Schenectady Plank Road Co. vs. Thatcher, 11 N. Y., 102.
Matter of Empire City Bank, 18 N. Y., 200, 223, 226.
Philadelphia R. R. Co. vs. Cowell, 28 Pa. St., 329.
Graff vs. Pittsburg R. R. Co., 31 Pa. St., 489.
McCalley vs. Pittsburg R. R. Co., 32 Pa. St., 25.
Pittsburg R. R. Co. vs. Stewart, 41 Pa. St., 54.
Greenville R. R. Co. vs. Coleman, 5 Rich. Law, 118.
Boggs vs. Olcott, 40 Ill., 303.

In addition to the above cases, there are many in which the general rule has been applied to the particular case of stock owned by the corporation and held by trustees, agents or nominees for it. These have already been fully abstracted (see *supra*, p. 14 *et seq.*).

3. The general rule is supported by numerous approved text writers.

"It is clear that one may become a stockholder in a corporation as well "by acts and conduct as by direct subscription to stock."

Bigelow on Estoppel, 3d Ed., 468.

"A person may become a shareholder to most, if not to all intents and "purposes without complying with all the formalities prescribed in that "behalf by the statute, charter or deed of settlement of the company, and "although there may have been informalities in the issue of the shares to "him; for if, notwithstanding these circumstances, he has been treated "as a shareholder by the company and has acted as a shareholder, both he "and the company will be estopped from denying that he is a share-"holder."

Lindley on Partnership, 129.

"Justice between the stockholders of a corporation demands that every "person who has enjoyed the privileges of membership must also bear its "burdens. For this reason it is a general rule that every person who has "acted as a stockholder may be held by the company to all the liabilities "of a stockholder, although the formalities prescribed by the charter in "becoming a member of the corporation have not been observed."

Morawetz on Private Corporations, Sec. 375, 131, 134, 135.

"The American courts hold that if a person purchases stock and suffers "his name to appear upon the books of the association he will not be "heard to impeach his own title. He will not be allowed to accept the "benefits without shouldering the burdens."

Thompson's Liability of Stockholders, Sec. 161.

4. This is the rule in the State of Missouri.

Griswold vs. Seligman, 72 Mo., 110.

SECOND.—THIS GROUND OF LIABILITY IS NOT ONLY ESTABLISHED BY AUTHORITY, BUT IS SOUND UPON PRINCIPLE AS WELL.

It is based upon two leading doctrines of the law. These are (I) estoppel by conduct, and (II) election between inconsistent positions.

I Estoppel is given as the foundation of the rule in many of the cases. Among them may especially be noted the following which have been cited above.

Sanger vs. Upton, 91 U. S., 56, 63.
National Bank vs. Case, 99 U. S., 628.
Sheffield Ry. Co. vs. Woodcock, 7 M. & W., 573.
Ex parte Besley, 2 M. & G., 176.
Matter of Reciprocity Bank, 22 N. Y., 9.
Hayes vs. Pittsburg, etc., R. R. Co., 38 Pa. St., 81.
Dayton R. R. Co. vs. Hatch, 1 Disney, 84.

It has sometimes been suggested that the estoppel can operate only in favor of persons who are shown to have acted upon the faith of the representation made by the particular stockholder, in accordance with the technical definition of the rules governing estoppels (Ketchum vs. Duncan, 96 U. S., 666, 1877). Mr. Thompson in his work on the Liability of Stockholders (Sec. 175), says, however, that but one case can be found where this rule has been applied, namely, Vice vs. Lady Anson (1 Mann. & Ry., 113, 1827). This, which was really a case of an alleged partnership rather than of a corporation, has been so discredited as to be no longer authoritative. (Thompson's Liability *ubi supra;* Griswold vs. Seligman, 72 Mo., 110.)

In all of the cases cited above not one can be found containing this element of a technical estoppel. In many instances the actions were by the corporations for calls, or by receivers for unpaid balances. In the very nature of those cases they could not

be founded upon any special action taken upon the faith of representations of the defendants. The cases in this Court (Sanger vs. Upton, 91 U. S., 56., Pullman vs. Upton, 96 U. S., 328. National Bank vs. Case, 99 U. S., 628), were by receivers for unpaid balances. There is no suggestion in any of them that action was taken by any person upon the faith of the representations made by the particular defendant.

The language of many of the cases is that the person estopped "has held "himself out to the public" as a stockholder. This seems to suggest the answer to the theoretical objection under discussion. The creditors, each of whom is one of the "public," act in reliance on the responsibility of all persons who have assumed to be stockholders.

In Eaton vs. Aspinwall, 17 N. Y., 119 (1859), the action was brought against defendant as a stockholder. He contended that he was not a stockholder, by reason of certain defects in the organization. He held a certificate of stock and appeared upon the books as a stockholder. The court (Gray, J.) *held* that the fact that the company kept a public office, transacted business in its corporate name, kept the usual corporate books upon which the defendant appeared as a shareholder before the contracting of the debt sued on raised the inference that the credit was given on the faith, not only of the liability of the corporation as such, but ultimately of the several shareholders of its capital, and the defendant was hence estopped from making such a defense. This case has been approved by this Court in Sanger vs. Upton, 91 U S., 64.

To the same effect are:

Ship's Case, 2 DeG. J. & S., 544, 555.
Davidson's Case, 3 DeG. & S., 21.
Abbott vs. Aspinwall, 26 Barb., 202.
McHose vs. Wheeler, 45 Pa. St., 32.
Thompson's Liability of Stockholders, Sec. 408.

The creditors are injured if such persons are allowed to disaffirm the representations made. The elements of an estoppel are thus complete.

It is also clearly contrary to public policy that persons who have assumed to place themselves in relations such as to incur responsibility to the public, should be allowed to deny those relations when such responsibility arises.

II. The general rule also rests upon the principle of election between inconsistent positions.

It is a general principle that "no man shall claim in "repugnant rights; a principle of more frequent appli-

"cation, perhaps, in courts of equity, but yet equally "recognized in courts of law." (Bacon's Abridgment, Tit. Election E.)

"A party cannot occupy inconsistent positions, and when one has an "election between inconsistent courses of action, he is confined to that "which he first adopted; any decisive act of the party done with "knowledge of his rights and of the facts determines his election and "works an estoppel." (Bigelow on Estoppel, 503.)

This principle is frequently applied at law.

Thus in Scholey vs. Rew, 23 Wall., 231, 345, where real estate had been devised to an alien, and he had received the proceeds, it was held that in an action for the succession tax, he could not be heard to question the legality of the devise.

See also Morris vs. Rexford, 18 N. Y., 552.
Rodermund vs. Clark, 46 N. Y, 354.
Field vs. Bland, 81 N. Y., 239.
Dewey vs. Bell, 5 Allen, 165.

Where an act may be construed in either of two ways, one of which is rightful and the other is not, the rule is that a party is held to be bound by that construction by which alone the act was rightful.

Hooker vs. Hubbard, 97 Mass., 175.

This ground of the rule is sustained by many of the authorities cited above.

In National Bank vs. Case, 99 U. S., 628, it is said that one of the grounds of stockholdership by implication, is that "after having taken the "apparent ownership, and thus become entitled to "receive dividends, vote at elections, and enjoy all the privileges of "ownership, it would be inequitable to allow him to refuse the "responsibilities of a stockholder."

See also Comford Co. vs. Lacey, 3 Y. & J., 80.
Cheltenham Ry. Co. vs. Daniel, 2 Eng. Ry. Cas., 728.
Chapman & Barker's Case, L. R., 3 Eq., 361.
Holyoke Bank vs. Burnham, 11 Cush., 183.
McHose vs. Wheeler, 41 Pa. St., 32.

III. Public policy sustains this rule.

If, therefore, defendant acted as the holder of the stock in question, that fact establishes that he assumed all the liabilities of the holder thereof.

SEVENTH POINT.

Defendant is liable under one, if not all, of the foregoing rules.

FIRST. HE WAS REGISTERED AS A HOLDER OF 60,000 SHARES, AND HELD THE CERTIFICATE FOR SUCH SHARES AT THE TIME OF THE TRIAL. THE FACTS PRESUMPTIVELY PROVE DEFENDANT TO HAVE BEEN THE HOLDER THEREOF, AND THERE IS NOTHING TO REBUT THIS PRESUMPTION.

The presumption therefore is that he was the absolute owner of these shares. This presumption is not rebutted in any way.

The certificate was issued pursuant to an agreement that the railroad company, "in consideration of advances" by Seligman & Company to it, should execute and deposit with them its entire issue of first mortgage bonds, "and "a majority of the capital stock authorized to be issued, "said stock to remain in control of Seligman & Com- "pany for the term of one year at least" (fol. 22). And the resolution authorizing the issue of the stock provided that the same should "be issued to Seligman & Company "to hold in trust for the period of twelve months" (fol. 26).

It is found as a fact that "the defendant never subscribed for the stock "nor agreed to do so, and obtained the same only in the manner herein "set forth" (fol. 28). The effect of this is, merely, that defendant had no relations to the company other than those consequent upon the agreement, resolution and other facts found.

There is nothing in this to support defendant's contention, that he is relieved from the obligation to pay for the stock implied by accepting the certificate. There is no stipulation, express or implied, to that effect. Defendant seems to rely upon the provision that the stock is to remain in the control of Seligman & Company for the term of one year, (fol. 22). But this amounts merely to an undertaking that Seligman & Company will not dispose of the stock for a year. It does not bind them to account to the company for the stock, or to return it. On the contrary, although the contract contains provisions with regard to the return of the bonds deposited with Seligman & Company (fol. 24), nothing is said about returning the stock. At the expiration of the year there is nothing whatever

in the agreement to prevent Seligman & Company doing with the stock whatever they see fit.

When the parties came to carry the agreement into execution their actions were consistent only with this interpretation of the provision in question. A certificate of stock, absolute in its terms, was issued. The defendant was given entire control of the corporation. The answer alleges that this was the very purpose of the agreement. Its language is that "the stock was deposited with Seligman & "Company on trust, as security for the payment of "said bonds, to be held by said firm for the purpose of ena- "bling it to control said corporation, and to see that its "affairs were honestly conducted and the earnings applied "to the payment of the bonds and the interest thereon, in "order that the interests of the said firm might be pro- "tected and the payment of their bonds secured, and for "no other purpose" (fol. 8).

While there is a further allegation in the answer that the stock was "the "property of the corporation, to be returned to it" (fol. 8), that allegation is entitled to no weight for the reason that it is not supported by the findings nor by the contract itself, and is inconsistent with the disposition actually made of the stock by the defendant. He never did return the stock, but had the certificate in his possession at the time of the trial (fol. 28).

Upon one of these books, indeed, the words "held in escrow" were written (fol. 32). In their legal signification these words were utterly inapt. But it is quite unimportant to discuss their precise meaning, of they can, in no event, have any other or greater force than the agreement itself. If the defendant became a stockholder thereby, as plaintiff submits is herein demonstrated, that relation cannot be affected by the use of the words, "held in escrow," in the transfer book.

It clearly was not only the force of the agreement but also the intention of the parties, that Seligman & Company should be enabled to control the corporation. This could be accomplished only in the mode actually adapted—namely, by issuing to them a majority of the stock. That necessarily constituted them stockholders.

2. Even if he were bound to return the shares to the company, he would still be liable to creditors, by reason of holding the legal title to the shares, within the rules above found.

SECOND. DEFENDANT ACTED AS A STOCKHOLDER.

He accepted and retained an unconditional certificate of stock (fols. 26, 27). He permitted himself to be entered

as a stockholder upon the books required by statute to be kept (fol. 29).

He executed a proxy upon which his stock was voted in March 1873 (fol. 37). Again, more than a year after the stock was issued to him, he entered into an arrangement that control of the road should be obtained for the bondholders by means of such stock, and signed a proxy by which a board of directors named by his agent was elected (fols. 38, 39). He knowingly permitted himself to be elected one of such directors (fol. 39), although he held no stock in the corporation other than that in question (fol. 8). The road was thereafter, by vote of the directors so elected, turned over to the holders of the bonds, among whom the defendant was the largest holder (fols. 41, 44). And the corporation was permitted, under the management of said directors, to pass out of existence (fol. 45).

These acts of defendant can be performed only by a stockholder. This is established by the following provisions of the statute law of Missouri in force at the time:

"In the election of directors each stockholder shall be entitled to one "vote for each share of stock owned by him. * * * No person shall be "a director unless he is a stockholder, owning stock absolutely in his own "right and qualified to vote for directors at the election at which he shall "be chosen (1 Wag. Stat., p. 99, sec. 6.)

"At every election of directors the transfer books of the corporation shall "be produced to test the qualifications of the voters, and no person shall be "admitted to vote directly or by proxy except those in whose names the "shares of the stock of the corporation shall stand on such books, and shall "have so stood for at least thirty days previous to the election (Id., Subd. IV.)

"No person shall be admitted to vote on any shares of stock belonging or "hypothecated to the corporation in which the election is held (Id. Subd. V.)

It is a general rule that stock owned by the corporation, whether issued or unissued, cannot be voted upon.

Ex parte Holmes, 5 Cow., 426.
Dayton, etc., R. R. Co. vs. Hatch, 1 Disney, 84, 96.
Brewster vs. Hartley, 37 Cal., 16, 27, 28.
Amn. Railway Frog Co. vs. Haven, 101 Mass., 398.

"Every such corporation shall keep a book on which the transfer of "shares of its stock shall be registered, and another book containing the "names of its stockholders, which book shall, at all times during the usual "hours of business, for thirty days previous to an election of directors, be "open to the examination of the stockholders (Id., Subd. VIII.)

Unless, therefore, defendant owned the stock, he had no

right to hold a certificate of stock, or to permit himself to be registered as a stockholder, or to vote at an election of directors, or to hold office as a director. Having done all these things, which a stockholder alone can do, he has clearly assumed to be a stockholder.

In Griswold vs. Seligman, 72 Mo., 110, the principles in question were held applicable to facts identical with the present, except that it did not there appear, as it does now, that the defendant voted upon the stock at the election of 1874, and was thereat, with his own knowledge, elected a director.

After fully stating and recognizing the general rule of stockholdership, by assumption or implication, the Court applied it to the facts as follows: "If, after the course of conduct pursued by them, defendants can, "in the face of the fact of the voting as stockholders, now successfully "assert their non-liability as such, it must be confessed that the doctrine "of stockholdership by reason of implied contract and by reason of "estoppel as announced in the foregoing authorities is shorn of what- "ever vigor it heretofore has been thought to possess. To deny in such "circumstances defendant's liability would be to declare the unpalatable "doctrine, a doctrine peculiarly unpalatable in American courts, that a "person may play fast and loose; may enjoy all the benefits and emolu- "ments of stockholdership without shouldering a tithe of its usually in- "separable burdens; may accomplish by an indirection what could not "be accomplished directly; may in a word be a stockholder to vote but "not a stockholder to pay. The bare statement of such a doctrine con- "demns it and its perniciously unjust results justify the condemnation."

THIRD. THERE ARE SPECIAL CIRCUMSTANCES WHICH ESTOP DEFENDANT TO DENY THAT HE WAS THE HOLDER OF THE STOCK IN QUESTION.

It has been seen above that an estoppel arises from assuming to act as a stockholder, whether or not it can be shown that plaintiff acted upon the faith of such assumption (*Supra*, pp. 13, 14). But the present case is even stronger than the rule requires, for there is evidence here

to show that plaintiff did act upon the faith of defendant's assumption to be a stockholder.

I. It is found that plaintiff was informed that defendant was to have control of the stock. He then went to defendant and told him that he, plaintiff, was informed that defendant was interested in the road, and conferred with him about proceeding with the work. Defendant then advised him to proceed as there would be ample means (fols. 33, 35).

II. Plaintiff offered to prove, further, that while the work was in progress he learned that defendant had voted upon the stock held by him (fol. 60). The Court excluded this proof, apparently upon the ground that it was unnecessary to make a complete estoppel. This ruling is the subject of the first assignment of error. If it should be held necessary, in order to make the estoppel complete, to show action upon the faith of the special stockholder in question, this ruling is manifestly erroneous.

It is clear, therefore, that, within the general rules, defendant was the holder of the stock.

CONCLUSION.

The defendant is liable in this action. The judgment should, therefore, be reversed, and the cause remanded with instructions to enter judgment for plaintiff.

BENJ. H. BRISTOW,
Of Counsel for Plaintiff in Error.

17-20

OFFICE SUPREME COURT U.S.
FILED
DEC 14 1882
JAMES H. McKENNEY, Clerk.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1882.

No. 136.

EDWARD BURGESS,

Plaintiff in Error,

vs.

JESSE SELIGMAN, JAMES SELIGMAN, AND DAVID J. SELIGMAN, EXECUTORS OF JOSEPH SELIGMAN, DECEASED,

Defendants in Error.

BRIEF FOR DEFENDANTS IN ERROR.

JOSEPH H. CHOATE,
Of Counsel.

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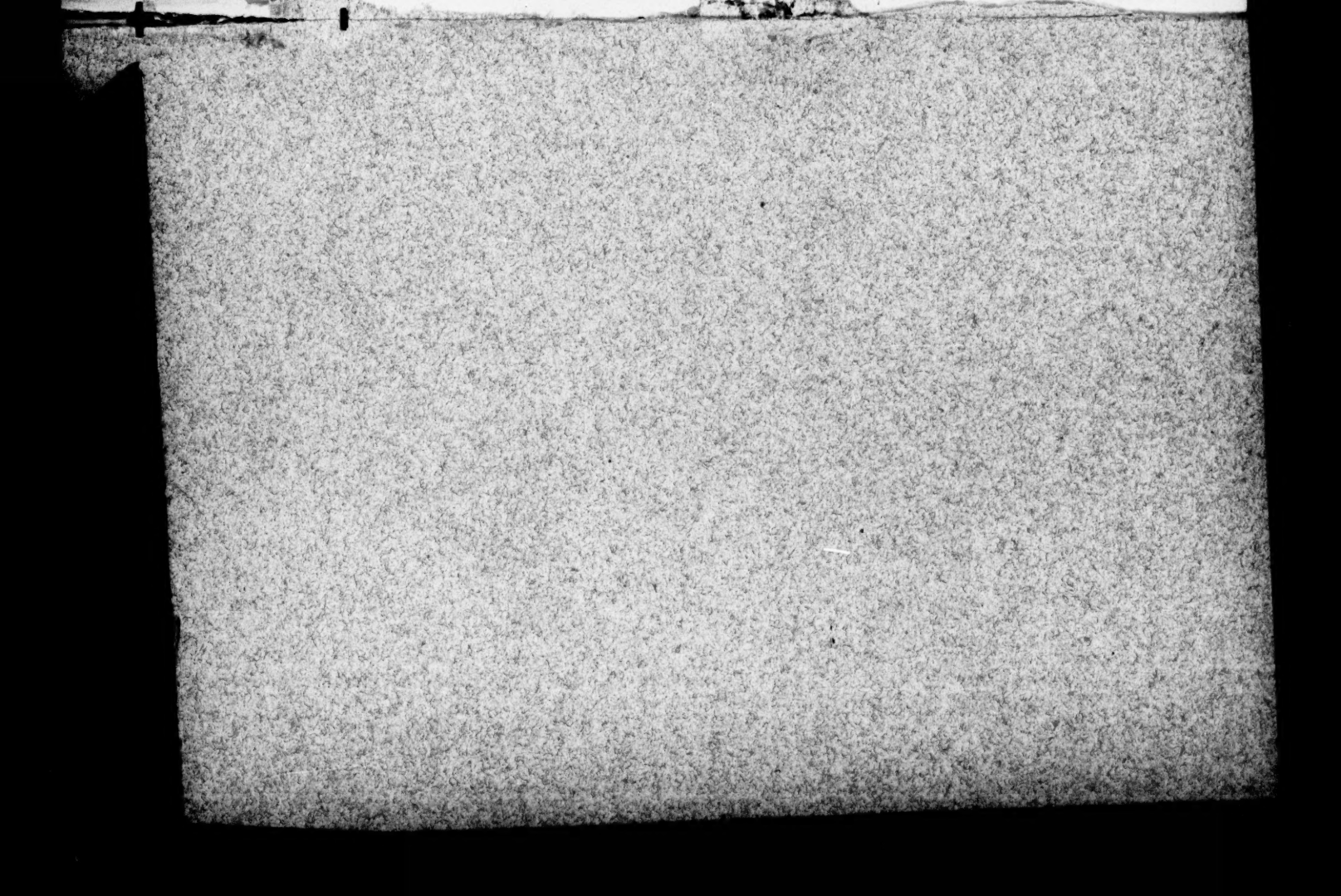

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1882.

EDWARD BURGESS, *Plaintiff in Error,* *vs.* JESSE SELIGMAN AND OTHERS, AS EXECUTORS, *Defendants in Error.*	*No.* 136.

Brief for Defendants in Error.

STATEMENT.

Under sections 649 and 700 of the Revised Statutes, there having been no exception to the findings of fact, those findings are conclusive and exclusive of all others, and constitute a special verdict, so that there are but two questions before this court: (1) as to the sufficiency of the facts found to support the judgment, and (2) as to the exclusion of a single item of evidence offered by the plaintiff in error, which forms the subject of the second bill of exceptions (Record, p. 18).

The suit is in the nature of a creditor's bill by a creditor of the corporation to reach, as equitable assets in the hands of the defendants, their alleged liability to the company to the extent of six million dollars as the alleged holders of sixty thousand shares of unpaid stock.

The material facts found are these: On the 28th of May, 1872, the president and secretary of the company issued and delivered to the defendants a certificate in the ordinary form for 60,000 shares of the company's stock (Finding V, Record, p. 9). *But the defendants never subscribed for the stock nor agreed to do so*, and obtained it only (Findings VI and IV, Record, p. 9) in pursuance of and under a resolution of the Board of Directors passed May 11, 1872, ordering the president and secretary, in making negotiations for money with the defendants, to issue certificates for a majority of the capital stock to them, *to hold in trust for the period of twelve months.*

The negotiations referred to in the resolution authorizing the issue of the stock to the defendants, consisted of a written contract previously authorized and signed, between the company and the defendants, but which does not appear to have gone into operation until after the passage of the resolution. It recites that the company, from certain specified subscriptions to its stock by cities and counties, had obtained the right of way to grade, bridge and tie its road for a distance of twenty-seven miles, and now sought additional capital "*by the sale of its first mortgage bonds*" for the purpose of ironing and equipping the road so far as built (Finding II, Record, p. 7).

Thereupon the company agrees to furnish the capital sufficient to completely prepare its line of road for the iron, and in consideration of the advances made and to be made by the defendants, "agrees to execute and deposit with the "defendants their entire issue of first mortgage bonds, five "million dollars, *and also agrees to deposit with the party of "the second part a majority of the capital stock authorized to "be issued, said stock to remain in the control of said party of "the second part, for the term of one year at least.*" (Record, p. 8).

The defendants agreed to purchase two thousand tons of iron, and from time to time to make such advances of cash

during the completion of the road to Carthage [*i. e.*, the section of twenty-seven miles] as shall not, together with the sum paid for the iron, *exceed two hundred thousand dollars*, the defendants to receive interest upon all their advances, until reimbursed by the sale of the bonds.

Privilege is given to the defendants to call any portion of the bonds at seventy cents and accrued interest. In case of failure to negotiate the bonds within the twelve months, the company agrees to repay all the advances, with interest and a commission.

The statute of Missouri (Gen. Stats. of 1865, p. 335, Sec. 8), in Chapter 63 of Railroad Companies, provides as follows: "Every such corporation shall keep a book, in "which the transfers of the shares of its stock shall be reg- "istered, and another book containing the names of its "stockholders, which book shall at all times during the "usual hours of business, for thirty days previous to the "election of directors, be open to the examination of the "stockholders."

In the stock-list book, under date of March 4, 1873, the name of the defendants appears, but with no statement as to the amount of stock held by them or any stockholders. The transfer book, under date of December 20, 1872, contains the name of the defendants, and opposite, the following entry under head of "No. of Shares": "60,000 (sixty thousand), *held in escrow.*" (Finding VIII, p. 11.)

The plaintiff, immediately after the making of the contract, had full notice of the making thereof and of its contents, and shortly afterwards, and before making his contract with the company, he called on one of the defendants and stated that he understood that he was interested in the road, and asked his advice about taking a contract for construction, and the defendant said "that the best thing plaintiff could do was to go on with the work westward, *and we will have ample means to get hold of the local bonds.*"

It seems that Cunningham (the President of the company) had represented to Seligman *that there was local means enough to grade the road* (the work in which alone the plaintiff was concerned), and he suggested to the plaintiff "that he would be safe in going on and entering into such a contract," and mentioned "that he thought it would be *better*

for all parties if the road was built and prosecuted westward."

In June, 1872, the plaintiff made a contract for grading a section of the company's road west of Carthage, outside of the section of twenty-seven miles provided for by the defendants' contract (Record, p. 11).

Only $864,000 of the $5,000,000 bonds agreed to be placed with the defendants were in fact issued, and the defendants took the same to the amount of over $400,000, and sold the rest (Record, p. 12).

At the first annual stockholders' meeting for directors, after the issue of the certificate for $6,000,000 of stock, the same was voted on under a proxy from the defendants, but no change in the management of the road was made by this election, the former management being continued. (Record, p. 12; Finding XIII).

Prior to the next election of March, 1874, the bondholders met and arranged that Baker, as the representative of the bondholders, should obtain for them control of the road by means of this $6,000,000 of stock, and under a proxy from the defendants he voted at the next annual election for new directors as the representative of the bondholders. The defendant's testator, Joseph Seligman, was one of the directors then chosen.

In 1874, the company having become insolvent, the directors turned over the property to the trustees named in the mortgage as provided by its terms, and it was sold under the trust deed, a committee of the bondholders being the purchasers (Record, p. 13). The company was dissolved, and the plaintiff obtained judgment against it for the amount sought to be recovered in this suit.

The statutes of Missouri contain the following provisions relative to the right of voting at elections of directors:

Gen. Stats. of 1865, chap. 65, p. 334, sec. 6: "Said directors shall be chosen annually by a majority of the votes of the stockholders. * * * In the election of directors each stockholder shall be entitled to one vote for each share of stock held by him. * * * No person shall be a director unless he is a stockholder, *owning stock absolutely in his own right, and qualified to vote for directors at the election at which he shall be chosen.*"

Sub. IV. "At every election of directors the transfer "books of the corporation shall be produced to test the "qualifications of the voters, and no person shall be admit- "ted to vote directly or by proxy except those in whose "names the shares of the stock of the corporation shall "stand on such books, and shall have so stood for at least "thirty days previous to the election."

Sub. V. "*No person shall be admitted to vote on any shares of "stock belonging or hypothecated to the corporation in which the "election is held.*" (p. 335.) And the following provisions in regard to the liability of stockholders:

Gen. Stats., Tit. XXIV., Of Private Corporations, chap. 62, Of their General Powers and Liabilities, sec. 11, p. 328: "If any execution shall have been issued against the "property or effects of a corporation, and if there cannot "be found whereon to levy such execution, then such exe- "cution may be issued against any of the stockholders to "an extent equal in amount to the amount of stock by him "or her *owned*, together with any amount unpaid thereon."

Sec. 20 (p. 330): "If any company formed under this act "dissolve leaving debts unpaid, suits may be brought "against any person or persons who were stockholders at "the time of such dissolution, without joining the com- "pany in such suit."

Chap. 63, Of Railroad Companies, section 9 (p. 338): "No "person holding stock in any such company as executor, "administrator, guardian or trustee, or any person holding "such stocks as collateral security, shall be personally sub- "ject to any liability as stockholder of such company, but "the person pledging such stock shall be considered as "holding the same, and shall be liable as a stockholder, ac- "cordingly; and the estates and funds in the hands of such "executor, administrator, guardian or trustee shall be liable "in like manner and to the same extent as the testator or "intestate, or the ward or person interested in such fund, "would have been if he had been living and competent to "act, and held the same stock in his own name."

Upon this state of facts and law the court below gave judgment for the defendants, and the plaintiff took a writ of error.

First Point.—There is nothing in the statutes of Missouri which justifies an action by a single creditor, to appropriate to his own exclusive use the trust fund, if any exists, composed of the liability of subscribers for unpaid stock. Such a fund belongs to all the creditors *pro rata*, and the only proper suit to collect and apply it is a suit in equity on behalf of all. The record shows the existence of other creditors.

Second Point.—The action clearly is *not one to enforce any pretended statutory liability of stockholders* for the debts of the company, but is framed only to reach the liability of the defendants as alleged *owners of or subscribers for unpaid stock* which equity properly regards as a trust fund for the payment of the debts of the company.

The sole object of the suit is to reach the portion of this trust fund constituted by the alleged liability of the defendants as an equitable asset of the company, and the action can only be maintained upon the ground that the defendants are debtors to the corporation, and, if debtors at all, necessarily debtors to the amount of $6,000,000, which indebtedness is sought to be availed of as equitable assets of the corporation which he cannot reach by execution, because of the dissolution of the company.

Our answer to the claim is, that the defendants never subscribed for or owned the stock, and never contracted to pay for it, and are not estopped by any fact shown upon the record to claim and prove this defense.

It is expressly found by the record that they never subscribed for the stock, or agreed so to do.

(*a.*) Certainly it would be a reproach to justice if it must be held that the defendants, coming to the aid of the enfeebled corporation upon its invitation by a loan of their money to a limited extent, to enable it to complete the

construction of the first section of its railroad, and receiving the sixty thousand shares as a temporary deposit, without any other right or privilege connected with it, and without any intention either on the part of the company or of themselves to create such a liability, are to be held liable for this enormous indebtedness as a reward for their timely aid.

On all hands it must be conceded that nothing was asked of them, nothing intended by them, but to furnish to the corporation in its distress, *not exceeding two hundred thousand dollars*, to rescue it from its impending difficulties.

Is it possible that this contract, contrary to the intention of the parties, resulted by the necessary force of legal rules in a liability on their part to pay the company six million dollars? If it did not, the plaintiff has no case. It is only by establishing this monstrous debt, based upon this innocent and meritorious contract for advances, that the plaintiff can recover anything. And we submit that no court will be astute to reach so extraordinary a conclusion, unless the settled rules of law and equity do inevitably constrain its adoption.

(*b.*) It cannot be necessary to argue to this court that by the written agreement of the parties, and the deposit of the certificate under it with the defendants, they did not become owners of the stock, and did not undertake to pay for it.

The written agreement of March, 1872, the resolution of the company under which that agreement was authorized, and the deposit of the certificate under the resolution with the defendants before their advances began, constitute the only agreement ever entered into between the Seligmans and the company. They are all three necessarily to be considered as parts of one and the same transaction; the contract, the resolution and the certificate constitute one act, and no one can claim in good faith that that arrangement evidenced by those papers made the defendants owners of the sixty thousand shares of stock, or gave them any other in-

terest in it than the documents themselves denote, namely, to be the temporary custodians of that certificate as a safeguard or collateral security to the bonds which they were to receive. They were to hold it as the property of the company, as company's stock, as still unissued stock, with no right to do anything with it but to hold it. The bonds they could sell and had a call upon, but they took nothing as to the stock, except the mere holding.

(*c*.) If it be asked what rights or interest, in respect to the certificate, the defendants acquired by the arrangement, the documents themselves furnish the answer. It was a temporary deposit merely. And that a practical purpose and benefit was secured by such deposit is obvious, as is illustrated in hundreds of similar transactions which have become of common knowledge to those experienced in railroad transactions in like cases. At the time of the contract the stock is recognized as being of no value whatever. The bonds likewise are of little or no value. Whatever value is possible to be created in either is by the advances to be made by the banker furnishing the funds for the construction of the road. The negotiation of the bonds, with a right to take them at the price fixed by the contract, is secured to him; and, in order to make it possible to work out a value for the bonds, it is stipulated, as is usual in such cases, that a large block of the stock, amounting to a majority of the whole, shall remain in the banker's hands for the time being, to avoid the possibility of its miscellaneous issue by the directors for nominal or no consideration, by which the market might be flooded with it, and its utter lack of value made apparent, which would react upon a negotiation of the bonds and impair their saleability, and, in fact, their intrinsic value. On the other hand, if the stock can be held until the road is built, it can be sold to great advantage.

This was the object aimed at and attained, and was of practical importance both to the company and to the bankers, to the end that if the object of the loan

succeeded, and the road was thereby put in practical operation, the stock should be restored to the company as a source of future capital.

(*d.*) Under such an arrangement, it cannot be disputed or doubted that, although lodged for safekeeping only in the hands of the bankers, with an obligation that it should remain there for a definite period of time, it still remained company's stock—unissued stock; in other words, no stock at all. It was in form a certificate of stock possible to be created in the future, and nothing more; and was not intended to give, and could not possibly give, to the bankers, any legal or substantial right or interest in it beyond its mere custody for the term limited, and the prevention of its immediate issue.

(*e.*) In a certain sense, the defendants held the stock in trust, as declared by the resolution, or in escrow, as certified in the transfer book, although the word is obviously used very inartificially there; but in trust for whom? in escrow for whom? Certainly not in trust as a security to be realized upon their debt in case of nonpayment. They could not appropriate it as a pledge on failure of the payment of the debt; certainly the law would not tolerate a claim on their part for the holders of such unissued stock for a loan of $200,000, to sell it in the market as pledged stock, and so to secure its indirect issue to the extent of $6,000,000 for the trifling amount of the pledge. This furnishes a test as to the extent of the substantial right and interest of the bankers in it. They simply held it for the definite period prescribed by the resolution, or, at the most, until their debt should be paid, with no benefits or rights as stockholders in respect to it.

In a certain sense, not strictly a legal one, but yet, quite intelligible to ordinary business men, who passed the resolution, they held it in trust; but quite as much in trust for the company as for themselves. Practically

it was in trust for all concerned to enable the advances to be made, and to enable the company, if possible, to maintain its corporate existence, and exercise its corporate franchise, and become a living corporate entity. The idea that the transaction in itself made them the owners of the stock, or created in them the liability to pay its par value to the company, or to the creditors, may therefore be dismissed.

(*f.*) It is very clear that as between the Seligmans and the company there was no liability to pay for the stock. Under the resolution it was to go to them only "in trust," and "only to be held for one year," and at the end of that time it was of necessity to go back to the company. Certainly there was agreed to be *a trust*, and the Seligmans were only trustees. Who were the beneficiaries? Certainly the company—as there could be no one else, except that the Seligmans were to have a mere right of holding for control merely, and only for a year. No one can doubt the real meaning and intention, and the court is bound to carry it out regardless of carelessness or lack of fitness in the language used by the parties.

The appropriate method of control was by preventing the stock from getting out to others—to overwhelm the subscribed stock and the bonds.

Doubtless, the parties supposed that this stock, held in trust for the corporation, could be legally voted on. In this they were mistaken. This might render the trust void in part or possibly in the whole. But, suppose the company does attempt to create a void trust, and transfers the stock upon it to the agreed trustee. The trust may fail for invalidity; but what is the legal consequence? It is as if nothing had been done. The stock goes back to the corporation which attempted to create the void trust in it. *Surely there is no principle which can convert the ineffectual attempt to create the trust into a sale of the stock to the trustee as beneficial owner, accompanied by an obligation on his part to pay for it,* when he never bargained for or agreed to buy it, and no idea of such a

transfer to him as owner was for a moment thought of by either party to the transaction.

It being clear that in the original transaction there was no sale or subscription, and no obligation to pay, the subsequent casting of a vote, which the law would not authorize, could not possibly have the effect to turn the pecuniary transaction of a trust or attempted trust, which both parties agreed for and perfectly understood, into a sale and obligation of payment which neither of them ever intended or imagined.

Is this result to be deduced as one of *contract?* There is no possible ground or principle for deducing such a result, wholly against the intention of the parties.

Is it to be deduced by way of *penalty* for casting an illegal vote? There is no statute and no legal principle which imposes such a fine or penalty.

The fair legal presumption and doubtless the actual fact is that the parties mistook the law as to the right of voting on stock held in trust for the company.

It would be monstrous to visit such a mistake with such a penalty.

And even if the parties knew the vote to be illegal, almost equally monstrous for a court of equity or of law to impose such a penalty when there is no statute imposing it.

The mere effect of casting the illegal vote is that if it affected the result of the election, the election would be set aside as of course upon application.

(*g.*) Everything material about the stock to show that the Seligmans held it merely "in trust," for control or intended control for a limited period, and that it belonged to the company who were the sole beneficiaries of the trust, *appeared upon the company's records.* The resolution showed it fully. The stock transfer book undertook to show it by the use of the words "*in escrow,*" a word clearly incomplete, inapt and *requiring explanation.* This explanation is adequately afforded *by the resolution, equally a part of the company's records,* and to that resort must be had for the necessary explanation. "In escrow" certainly does not of itself

technically import that the Seligmans were the owners, because delivery in escrow cannot be to the grantee himself. The true and correct transaction intended to be indicated in the transfer book by this loose use of the technical word "in escrow" was indicated to everybody by the resolution equally a part of the corporate records.

But now suppose that the language of the resolution had been carried into the certificate. and that language had been employed therein so as clearly and fully to express what was probably intended and agreed to between the parties, viz.: that the Seligmans were to hold the stock in trust for the year, with power to them to use it during the term for control, and at the end of the year were to return it to the company, as its owners. the beneficiaries of the stock, and suppose that then the Seligmans had voted upon it.

Could it be pretended that such voting (illegal as it was) had the legal effect to turn the transaction as expressed in the certificate into a sale, and to create an obligation on the part of the Seligmans to pay for it its par value?

Third Point.—*The decision of this Court on the subject of the liability of stockholders in the Upton cases,* and the other cases cited by the plaintiff in error, *are in entire harmony with our defense,* and lend no support to the plaintiff's claim.

They hold subscribers to stock, and all parties who by purchase or otherwise have entered into an equivalent relation with the company, to a rigid liability, and hold that when by such subscription or other equivalent act the party has once undertaken to be an owner of stock, and has thereby brought into existence the trust fund which equity raises out of the liability of sub-

scribers, for the payment of the debts of the company, or so much of it as is represented by his stock, no evasion, no device, no arrangement with directors or officers of the company, can shelter him from the liability or put out of existence the trust fund so created. But there is no where in the decisions of this court any intimation that where, as in this case, there is a clear, express contract defining the rights and relations of the parties, and excluding the idea of ownership and liability to pay for the stock, any such liability accrues in favor of creditors against the holder of the certificate. We submit that it is a violent perversion of anything decided or uttered by the court in the cases referred to, to attempt to bring them into line as authorities for the plaintiff's claim.

In the first case of *Upton* against *Tribilcock*, 91 U. S., 45, the party charged *admitted that he had been a subscriber for the stock;* but he attempted to set up an agreement with the directors by which the subscription was to be canceled upon his executing his promissory note for twenty per cent., secured by real estate mortgage; and that such note was a full payment of the whole one hundred per cent. He also claimed that misrepresentations of the agent of the company, to the effect that he would only be responsible for the twenty per cent. was a good defense against the creditors' claim, and that the words "non-assessable" upon the certificate of the stock impaired his obligation to pay the amount due upon it. But the court very properly overruled all these pretenses of defense and held that no contract betweem the company or its agent and the stockholders, limiting their liability as to unpaid installments of stock *once subscribed for or purchased*, can operate as against the creditors of the company and the assignee who represents creditors, and that representations upon which subscriptions are induced are no grounds of defense; they were merely representations as to the legal effect of the subscription which was admitted. We are confident that the most thorough examination of the case of *Tribilcock* will furnish no war-

rant for the extraordinary doctrine on which the plaintiffs seek to rest their case.

The next case, of *Sanger* against *Upton*, 91 U. S., 56, was one in which the stockholder attempted to avoid liability, although *she had bought and received from the company two stock certificates* of five thousand dollars each, in the usual form and in all respects complete, except that the blank was left for the name of the owner, upon the plea that she had paid twenty per cent. in cash and given her notes for twenty per cent. more, but had in fact never signed any subscription or made any other contract than that which was implied by the purchase of the stock and the payment of those two calls. The court said the only question was whether she *owned the stock.* No one else claimed it; the certificates were issued and delivered to her; they belonged to her; they were the muniment of her title; she could have filled the blanks with her name whenever she thought proper; she had paid to the company all that was then payable, and subsequently received a dividend; her name was placed upon the stock list. These facts were conclusive against her; she was estopped from denying her ownership. Upon receiving the certificates, the law implied an agreement on her part to respond to the balance whenever called upon in any lawful way to do so. No special, express agreement, written or oral, was necessary. It would be a mockery of justice to permit such an objection to prevail.

Certainly nothing can be a greater perversion of an authority than an attempt to cite that case as a warrant for holding the defendants here liable because of the deposit of stock with them under the agreement of March, 1872.

The next case, that of *Webster* agst. *Upton*, 91 U. S., 65, differed only from the *Tribilcock* case by this, that the party sought to be charged, instead of being an original holder of stock from the company, was a purchaser and transferee of the stock, and it was held that he is liable for calls made after he has been accepted by the company as a stockholder and his name registered

on the stock books as a corporator, and being thus liable there is an implied promise that he will pay calls made upon such stock while he continues its owner; and that a purchase of stock is of itself authority to the vendor to make a legal transfer thereof to the vendee on the books of the company.

The court say: "Stockholders become such in several ways—either by original subscription, or by assignment of prior holders, or by direct purchase from the company. An express promise is almost unknown, except in the case of an original subscription; and oftener than otherwise it is not made in that. The subscriber merely agrees to take stock. He does not expressly promise to pay for it." And again: "It must be assumed after the verdict of the jury that *the defendant voluntarily became a stockholder*," and it is only a reaffirmance of the doctrine that there is no need in such a case of an express promise to pay for the stock. "If the law," says the court, "implies a promise by the original holders or subscribers to pay the full par value when it may be called, it follows that an assignee of the stock when he has come into privity with the company by having stock transferred to him on the company's books, is equally liable. The same reasons exist for implying a promise by him as exist for raising up a promise by his assignor."

So the unrighteous attempt of a stockholder to screen himself from liability was properly defeated. Certainly that is no authority for holding that an implied agreement to become the owner and pay for the stock can be raised out of a situation which rests upon an express agreement directly the other way, which is what the complainants in this case have got to make out to maintain their case.

In *Upton* agst. *Pullman*, 96 U. S., 28, the court held that where stock had been duly issued (which is not our case) and transferred to the defendant, who caused the transfer to be made to himself on the books of the corporation, he was liable for the unpaid balance to

the assignee, although he held it as collateral security for a debt of his transferor. And this upon the ground that the stock *having been once issued*, the liability upon it was created; that by the transfer procured by the defendant to be made to himself, the transferor was discharged from that liability, and it was by implied agreement assumed by the transferee; and that inasmuch as the defendant had the beneficial interest in it, of which he might avail himself to secure the payment of his debt, it made no difference that as between himself and his debtor, he held it merely as security.

In *Holly* agst. *Upton*, 102 U. S., 314, there was, as in the previous cases, an actual subscription, and the attempted defense was that no certificate had been issued, the court holding that a certificate for the stock is not necessary to make him a subscriber, or to make him liable on his subscription, and the Chief Justice there adds exactly what we claim to be necessary to make a party liable: "All that need to be done," he says, "so far as creditors are concerned, is that *the subscriber shall bind himself to become a contributor to the fund which the capital stock of the corporation represents. If such an application exists*, the courts can enforce the contribution when required. *After having bound himself to contribute, he cannot be discharged from the obligation he has assumed* until the contribution has actually been made, or the obligation in some way extinguished."

But there is no suggestion in that or any of the *Upton* cases that a party may be charged with liability unless he first, by his own voluntary act, assumes it.

In *Chubb* vs. *Upton*, 95 U. S., 665, the plaintiff was *an actual subscriber*.

In *Hatch* vs. *Dana*, 101 U. S., 205, the attempt was to screen *an actual subscriber* from liability, by an arrangement that the subscribers were only to pay for their shares "as called for" by the company, and that the company had only called for thirty per cent.

In *Hawley* vs. *Upton*, 102 U. S., the point that the non-receipt of a certificate by one who had subscribed,

and who, upon the strength of his subscription, had been registered as a stockholder, was overruled.

In *County of Morgan* vs. *Allen*, 103 N. S., 468, the county had subscribed for the stock, and pleaded that that subscription was without authority of law.

Fourth Point.—*The certificate in the defendants' hands, under the contract and resolution, did not give them the right to vote at any election of directors.*

(*a.*) The express provision of the statute of Missouri, already referred to, settles this, if it were otherwise in doubt. Nothing can be more explicit: "*No person shall be admitted to vote on any shares of stock belonging or hypothecated to the corporation in which the election is made.*"

(*b.*) It may be well, in this connection, to refer to such authorities as exist on the question of the nature and the relative rights of the parties in respect to such unissued stock, or stock owned by the company, and especially as to the right of voting upon it, independent of the provisions of the statute of Missouri.

It will be found that the provision inserted in the statute of Missouri is but a concise expression of the result of these authorities, to wit, that stock belonging to the company, whether unissued stock, or stock once issued and paid for, and reacquired by it, cannot be voted upon.

In *Dayton and Cincinnati Railroad Company* against *Hatch*, 1 Disney (Superior Court of Cincinnati), 96, the court considered the direct question as follows: "What, then, are the rights of an organized company over its unsubscribed stock? It appears to me that, in the absence of any express legislative provision, it has simply and plainly, so far as respects the power of disposition, the rights of an ordinary owner, the same rights which it

would have over any portion of the subscribed stock which might be transferred to it in payment of a debt or otherwise. From the nature of the interest in it, such stock cannot be voted."

In *Brewster* against *Hartley*, 37 Cal., 16, ten thousand shares of company's own stock had been issued to *McLane*, a trustee for Wells, Fargo & Co. to secure past and future advances, *with authority to vote thereon*, and the court said: "It is not claimed on the part of respondents that *McLane* had any right to sell the stock, but it is admitted that he is to hold it until the money is paid, and thereupon to transfer it to the company."

And the court follows the decision of the Supreme Court of New York in *ex parte* Holmes, 3 Cow., 426, where it had been held that it is not to be considered as stock held by any one for the purpose of voting upon it. "No doubt," the court said, "in that case the company may, from necessity, as in this case, take their own stock in pledge or payment, and keep it outstanding in trustees to prevent its merger. But it is not to be voted upon within the meaning of the charter or of the General Act."

And that, it is to be noted, was stock that had already been issued and had come back to the ownership of the company in payment of a debt.

And then the court (in *Brewster* v. *Hartley*) proceeds: "This doctrine must command the assent of every one, unless it can be shown that a corporation can become a stockholder, in the sense of the statutes, of its own stock, receiving from itself dividends, and responding to itself for calls for assessments, and being responsible for the debts of a corporation, first as a corporation, and second as a stockholder."

In this case *McLane* had voted the ten thousand shares and carried the election. The court set the election aside, and said further (page 30): "While the position that the corporation may issue its stock in payment of its indebtedness is not questioned, it does not follow that the stock may be issued *to secure* such indebtedness. The claim of authority to pledge the

unissued stock necessarily assumes the very point in controversy, the authority to issue the stock without purchase or payment. The capital stock of a corporation, previous to its being issued, cannot in any proper sense be called the property of the corporation. The corporation possesses only the right, the power, to issue the stock, and a condition precedent to the exercise of the power is the purchase and payment for the stock. If the power exists in the corporation to issue stock to secure a loan or indebtedness, it is practically unlimited. Directors may issue and pledge all the capital stock not held by stockholders, as security for a trifling loan, and by the aid of the stock thus issued, they may perpetuate themselves in power beyond reach of redress on the part of the stockholders."

American Railway Frog Company agst. *Haven;* 101 Mass., 398, was a mandamus in the case of a disputed election, four hundred shares having been voted by Clark, treasurer, which were disputed.

" It was agreed that all the stock had been properly issued to the original holders, and that these four hundred shares were afterwards transferred by different shareholders from shares held by them to Clark to hold for the benefit of the corporation." But the court held that it must be treated as *unissued* stock and not voted upon. The court said : " By the terms of the transfer, Clark holds for the benefit of the corporation, and, of course, subject to its order. This is the extent of his trust. Nothing in the nature of it makes it necessary that he should vote as the holder of those shares. There is no apparent reason why he, not being beneficially or practically the owner of them, should be endowed with the privilege of controlling four hundred votes according to his own judgment or pleasure, especially when it is taken into consideration that the corporation for which he holds them has no rights of voting in any event. It is easy to see that any such privilege would not only be unreasonable and unfair, but might lead to great abuses. The position of these shares in our judgment is the same to all intents and

purposes, so far as the right of voting upon them is concerned, as if they were held directly by the corporation itself, and until they are sold and transferred by its authority, the right of voting upon them is suspended. It follows, then, that at the annual meeting in question, the votes on these four hundred shares ought not to have been received or counted. A corporation cannot literally be one of its own stockholders in the full sense of that term."

(*c.*) The inevitable conclusion is that the defendants' act of voting upon the stock was an absolutely unauthorized, unlawful and void act. So far as it entrenched upon the rights of the actual stockholders, there was an obvious remedy alike under the statute of Missouri and at common law. Any person aggrieved by the election could apply to a proper court for redress, and set the election accomplished by the vote upon the stock aside, and have a new election ordered. It is not possible, however, to suggest how the rights of any person other than a stockholder could be affected, or how, if existing creditors could be said to be legally injured thereby, they could have any other form of redress.

Fifth Point.—*There is nothing in the case to raise an estoppel against the defendants, to preclude them from denying their ownership of the stock, or their liability for the amount represented by it.*

(*a.*) The only matters that can be invoked in support of the claim of such an estoppel, in addition to the holding of the certificate, is the defendants' act of voting upon the stock; and the vote at the annual meeting held in March, 1873, is the only vote to be considered, for the plaintiff stopped work under his contract in the fall of 1873, and, therefore, cannot possibly claim to have relied upon the vote at the subsequent meeting. And

as to the company, if voting estops, one vote is as good as two; if it does not, then no matter how often the defendants voted on the stock.

Besides the vote, there is the conversation between the plaintiff and Joseph Seligman, and that is all.

With respect to the vote, the fact is expressly found that the plaintiff knew of the contract immediately after it was made. He is, therefore, charged with knowledge of the terms on which the stock was held by the defendants; so that, as between the defendants and the plaintiff as a creditor, the question as to an estoppel by the voting and the holding of the stock, is exactly the same as between the defendants and the company itself. He knew of the contract, and thereby stands in no better position than the company, and he does not appear to have known of, or to have relied upon, the fact of the voting, and the simple question is whether, as between the company and the defendants, an estoppel is raised by the act of voting.

(*b.*) This question is liable to be confused by refusing to apply to it the ordinary principles by which estoppels are created. The same elements are requisite to the creation of an estoppel in reference to a stockholder's liability as to any other subject-matter.

There is no peculiar charm or magic in this special subject which will call into existence an estoppel upon facts that would not justify it in any other branch of business. "To establish an estoppel *in pais*, it must "appear, first, that one party has made an admission or "assertion inconsistent with the claim offered to be set "up; second, that the other party has acted upon that "admission or assertion; and, third, that such other "party would be injured by allowing such admission "or assertion to be disproved."

This court has well defined the essentials of an estoppel in the case of *Ketcham* v. *Duncan*, 96 U. S., 666, where Strong, Justice, says:

"An estoppel *in pais* does not operate in favor of

everybody. It operates only in favor of a person who has been misled to his injury, and he only can set it up. If, therefore, there be any estoppel in this case, it must be in favor of some bondholder (if any there was) who was led to believe, by the action of William B. Duncan, that the railroad company was paying the coupons of the first mortgage then falling due, and paying them in order to extinguish them, but no such bondholder asserts such an estoppel. So far as it appears, no one of the appellants was so misled. No one of them can claim an estoppel which is personal, and of which only the person misled to his hurt can avail himself."

(*c.*) Without seeking further for definitions of estoppel, what is there in the acts imputed to the Seligmans to create one as against the company?

What took place at the election when the vote was cast, is shown to have been done by all parties in direct contemplation of the existing contract unmodified, and that the privilege of voting was asked and accorded, although the Seligmans were not owners of the stock or in any way interested in it except as holders of the certificate, as custodians in trust for the purposes in the agreement described.

(*d.*) The company did nothing upon the faith of the act. If, the day after the vote had been cast, the company had, upon the strength of it, sued the Seligmans for the six millions represented by the stock as then immediately due because of the vote, the claim would have been scouted by everybody. There would have been no pretense of foundation for it. And yet, if this notion urged by the plaintiff of an estoppel being created by the stock certificate being issued to them and by the vote having been cast upon it in their name were sound, it would necessarily follow that they, the next day, had changed their position from that of creditors for their advances, holding the bonds with right of call for security, and the custody of the certifi-

cate in trust, to that of debtors for the immediate payment of six millions of dollars.

In fact, not a single element going to make an estoppel exists in the case. The defendants made no representations inconsistent with the existing agreement, the effect of which clearly was that they were not to be owners of the stock. The act conveyed no suggestion to the company inconsistent with the agreement; the company took no action upon it; did not in the least change its position; was not misled or damaged by it.

(*e.*) In view of the authorities already cited, it is plain that they had no right to vote, and that the presentation of the proxy asking for that privilege was a mistake; but this mistake, mutually concurred in by them and the company, gave them no additional rights in the stock, did not deprive the company of its right to it subject to the deposit, nor create a contract or understanding between them and the company that they should, in consideration of the privilege of casting that vote, pay to the company the six millions of dollars represented as the par of the stock. The question as between the company and the defendants stands exactly as it would upon a proceeding to set aside the election because of the illegality of the vote. Nothing had occurred between the issue of the certificate and the act of voting which could preclude the defendants and the company from denying its illegality, or which could have converted their holding from a naked deposit in trust to a beneficial absolute ownership.

(*f.*) We do not deny that a creditor of a corporation, like any other creditor filing a creditor's bill, may establish an independent estoppel as against the party alleged to be holding equitable assets, of which the company or principal defendant could not avail themselves. A direct representation to the plaintiff, on the strength of which he became a creditor and gave trust, might estop a defendant from setting up afterwards, contrary to the representation so made, that he was not indebted, and so

might estop a person who had represented himself as being an actual owner of stock from afterwards denying it as against that creditor; but no such facts are pretended to exist here.

(*g.*) So in regard to the principle that the stock of a corporation constitutes a trust fund for the payment of creditors. There is no room for dispute about that. *But the stock must first be called into existence by a subscription or some equivalent agreement.* It is the *subscribed* stock that constitutes such trust fund, not the unissued stock--not the mere husk of a certificate representing no ownership. And the proposition which we offer in regard to this pretended estoppel in favor of a creditor of a corporation is this: that although a party who has subscribed to stock is, as against the company and against the creditors, both estopped from denying his liability or from setting up any arrangement with the company by which that liability may be defeated, except by payment, yet that no such doctrine applies, or has ever been applied, to unissued and unsubscribed stock, *so as to create a subscription or agreement by estoppel, which was never intended, as between the company and the alleged stockholder,* nor has it ever been held, nor is there any ground for holding, that a party holding stock *under a clear, express contract defining his rights and relations, and excluding the idea of ownership and liability to pay for the stock,* is by unlawfully voting upon it estopped as against the company, or as against a creditor who never heard of or relied upon the act of voting.

Such cases as *Eaton* vs. *Aspinwall*, 17 N. Y., 119, and the other cases cited to the same effect under the plaintiff in error's second subdivision of his Sixth Point, have no applicability to the case at bar. There a stockholder was simply held to be estopped to deny the regularity of the organization of the company, as a defence to liability for the payment of the unpaid subscription due on his shares.

Certainly in the present case there can be pretense for claiming that the defendants in error "held them-

selves out to the public," or "held themselves out to the company" as being the real owners of the shares in question. They made no representation on the subject which they now seek to disaffirm.

The principle by which a party is held to an election between inconsistent positions is, only a part of the equitable doctrine of estoppel in *pais*, and does not alter or diminish the elements necessary to constitute one.

It seems to us impossible for any one seriously to claim that with full knowledge of the actual relation of the defendants to the stock under the contract and resolution, any one could have inferred (or have had a right to act upon the inference), that by their wrongful claim to vote upon the stock the defendants had elected to be its owners, and thereby to put themselves under liability for the six millions of dollars represented by it.

Whatever loose language may be found in some cases on the subject there is nothing in principle or authority to justify so startling a conclusion.

Under the resolution and contract, which must have been ever present to the company and the Seligmans in all their acts, there was certainly no holding themselves out to the former by the latter as owners of the stock. But the plaintiff, who equally knew all the facts, claims as part of the "public," and that there may have been a "holding out to the public." Now, whatever any party who, in ignorance of the facts, had relied on the defendants' certificate or their act of voting, might have argued or claimed, it is absolutely clear that there *was no such holding out to the plaintiff*, who knew everything.

The effect of what was done either by receiving the certificates, or by means of the entries in the two books, or either of them (which the defendants are not shown to have authorized or known anything about), or by the voting, as an alleged *holding out to creditors in general, or to the world*, needs not to be considered.

No such holding out to others could give rights to the plaintiff, who knew the real facts.

And thus the cases of suits brought by Receivers, or

assignees, or others representing creditors in general, so far as they go upon the ground of "*holding out*" or presumed action of creditors, based upon apparent ownership, are entirely inapplicable to the case of this plaintiff.

The English cases under the Companies' Acts are all inapplicable.

Those acts make the "entry on the register," under the authority or with the acquiescence of the person whose name is entered, conclusive evidence to fix the "liability to contribute." All creditors and other stockholders are presumed to base their actions on the register, and the party charged cannot go behind it (unless his name was placed there without his authority or acquiescence).

The decree for contribution rests upon the register required by law, and made by it the final evidence.

Sixth Point.—The decision in the case of *Griswold* against the same defendants, reported in 72 Mo., 110, is at variance with the authorities, and is not founded upon sound principles, and we call the special attention of the court to it with the purpose of demonstrating that there is not a single authority relied upon in that opinion which sustains the conclusions of the court.

[NOTE.—*The Griswold case differs radically tn its facts from the case at bar*, in that there the plaintiff *Griswold* had no knowledge of the defendants' contract, and of the actual terms on which they received the certificate, while here the plaintiff had full and absolute knowledge of the whole transaction.]

(*a.*) First, there is no doubt of the proposition stated that the relation of stockholder may be created without the usual formality of subscription, and that the acceptance of stock and other

similar acts are, in contemplation of law, the legal equivalent of subscription. We should go so far as to concede that any act which necessarily implies an agreement to become the owner of the stock is quite as effectual as a formal subscription. And that is all that the cases in that connection cited by the learned court hold. The case of *Railroad Company* agst. *Graham*, and other cases cited from 2 English Railway Cases, 870, &c., from the reference made to them, one would suppose, were authority for holding that the mere acting as depositary of a certificate of stock, or the mere voting on such a certificate so held under the circumstances shown in this case, was accepted by the court as an equivalent for a subscription to pay for the stock. But an examination of that case and of the other cases from the same volume cited, will show that they were all cases of parties who had, in good faith, intended to become stockholders, and had either made the preliminary deposit required for the same, or purchased scrip certificates from others, and who then tried to escape payment of calls by claiming that certain formal requirements of the incorporating act, as to registering or other similar formality, had not been complied with.

There is not a single one of those cases that has any other force or effect. It was a pure attempt in each instance to escape liability by a party, who had intended and proceeded to avail himself of the beneficial interest in the stock, on a quibble as to a noncompliance with a formal prerequisite.

In *McGuire's* case, 3 De Gex & Smale, 21, the question was whether a young gentleman, in whose name stock in a company had been placed by his father to the extent of two shares, and who had been in the habit, as a proprietor, of securing and using free passage tickets in the vessels of the company, was properly placed on the lists as a contributor; and there, although the son denied any knowledge of the stock having been transferred to his name, yet the Vice-Chancellor was constrained, as he said, to find from his conduct that this was not true and that he did know it, and the Ap-

pellate Court sustained his liability on that ground; that is to say, that he had voluntarily made himself the beneficial owner of stock and assented to its transfer to his name.

In *Railroad Co.* agst. *Stewart*, which is cited by the court as establishing an estoppel by conduct, from denying liability, it is held that although the act of voting after his discharge from the contract very strongly warranted the presumption that the defendant had resumed his original obligation as a stockholder, yet the court adds what is very pertinent in this case: "*But these acts are shorn of their importance by the facts that there was a special contract accounting for them all*— an express contract of conditional subscription to which they are referable, whereby he was to pay for his shares in materials." And notwithstanding that as to a part he had waived his right and paid cash, the court sustained a verdict for the defendant in assumpsit for the balance of the subscription.

Chase agst. *Merrimac Bank*, 19 Pick., 564, is correctly cited by the court; but the point of the decision is that the statutes of Massachusetts do not prohibit a party from becoming a member of the bank in any other manner than is therein prescribed. The agreement of the parties, however manifested, is sufficient to constitute membership; and this the plaintiff had clearly agreed to, although he had not filed a certificate of membership pursuant to the act; and in this regard the case is very much like the English case first cited, where there was an attempt to escape liability by a flaw in the formal proceeding requisite for membership.

Bank agst. *Goodman*, 9 Cush., 576, also relied on, was an action against stockholders in a manufacturing company to enforce liability imposed by a statute by reason of a failure to have capital stock paid in and a certificate filed. The defendants had purchased and paid for shares, surrendered certificates and received new ones from the company in their own name, and their attempted defense was, no written instrument of transfer to them from a former owner, and because the cer-

tificates to particular shares of stock were not subscribed by the treasurer, but by the clerk.

Davidson's case, 3 De Gex & Smale, 21, was a case where a party subscribing for the stock and so intending to get the full benefit of it, attempted to screen himself from liability by a private arrangement made with the directors that he should not be liable, as in very many of the cases where it was agreed that stock issued should be regarded as full paid stock when it was not full paid. And though that case is properly cited, so far as it goes, by the learned court in the *Griswold* case, yet this significant passage from the opinion of Vice-Chancellor Bruce is omitted: "From the materials before the court it appears to me a just inference that the transaction of 1837 (by which Davidson got the stock) respecting the one hundred shares of which seventy are in question was devised and carried into effect by the parties to it, for the purpose of enabling or accrediting a fallacious representation that Mr. Davidson had taken and was the holder of those shares on his own account and at his own risk; the object having been to induce or encourage, by means of which this was a part, the taking of shares by persons whom Mr. Hannay (the manager) or the directors might think it advantageous or useful to add to the company. If this was so, a court of justice at least must regard the transaction as unfair, and treat it as one tainted with deceit."

Besides, it appears in the case that Mr. Davidson actually subscribed the deed of settlement, agreeing to be a proprietor, and that, as to stock standing in his own name, the agreement was that he should be deemed, both in law and equity, "the absolute, sole and beneficial owner thereof," and that the company should not, in any case, be bound to notice or be affected by any trust thereon.

And that is a fair sample of the cases which hold a liability as stockholder to be created by estoppel. We do not pretend in this case that if we had once subscribed we could have set up any agreement with the directors modifying that liability as a defense to the

claims of creditors. Our proposition is that we never either did subscribe or do any act, or take any position equivalent to a subscription, or implying in the least degree an obligation or promise on our part to pay for the stock, or be its owner.

The case of *Vice* agst. *Anson*, the learned court refers to as the only case where a creditor suing an individual, not a stockholder *de jure*, for a corporation debt, has been denied recovery, unless able to establish that the debt was contracted on the personal credit of the particular person sought to be charged. The case (reported in 1 M. and R., 113) will, upon examination, be found to be no case of a corporation at all, but a pure case of partnership, where, in respect to liability for the debts of a mine, the question was whether the defendant either had herself been, in fact, a partner, or had held herself out as such.

All the cases where holding one's self out as a stockholder has been made the foundation of liability by estoppel, are where there has been a holding one's self out as an actual owner, and there is nothing in them which would embrace a case like this, where there is no such holding out, but, on the contrary, an express agreement forbidding any such holding out.

It is practically conceded by the learned judge, that in order to create an estoppel, it must be an estoppel existing between the company and the alleged stockholder.

And then the learned court proceeds to rely upon the *Upton* cases as instances of such an estoppel; certainly a most unfortunate choice of authorities on its part, because each one of those cases, as we have attempted to show, is utterly inconsistent with any such doctrine.

The case of *Johnson* agst. *Laflin*, decided by Judge Dillon, where the president of a national bank with its funds bought stock, which he had "no right to do with those funds, and held it registered on the books as held by Britton, trustee for the bank," is no authority against us. The very fact that his dealings with the

bank's money were unlawful made him personally responsible for it, personally chargeable upon the stock, which he could not hold for the bank, and he couldn't screen himself under the section of the United States Revised Statutes which exempts from liability a holder in a trust capacity.

Judge Dillon had decided that case before this case came before him for decision, and there will be found no inconsistency between the cases. It was not possible to hold anything else than he did hold in the *Laflin* case, under the peculiar situation of the stock there in question, nor was it possible for him in this case to come to any other conclusion than he did, that in regard to the defendants' holding of the stock of this railroad company, no liability as subscriber resulted therefrom.

The case of *Wheelock* agst. *Kosk*, 77 Ill., 296, differs wholly from the present case. There was regularly issued stock which had become the property of the bank and was transferred by it, not as deposit with a naked custodian, but as collateral security for a loan of money to the bank; and the pledgee, not content with holding the certificate, *had it transferred to his own name and collected the dividends upon it*, thereby necessarily manifesting a purpose to avail himself of the beneficial ownership of the stock; and the intent with which he did these acts is wholly immaterial.

The National Bank v. *Case* (99 U. S., 628) was a similar case, not raising any question of the liability of a holder of unissued stock on deposit from the company, but where the claim was of the statutory liability of the holder of stock of a national bank for an assessment of an amount in addition equal to the amount of his stock to pay the debts of the company, and it was there held that one to whom stock, which has once been issued and paid for and been transferred in pledge or as collateral security for money loaned, and *who has caused the stock to be transferred on the books of the company to himself as owner*, is liable as a stockholder for the benefit of creditors, on the ground that he is

estopped from denying his liability, by voluntarily holding himself out to the plaintiff as the owner of the stock; that by taking the legal title he has released the former owner, and that after having taken apparent ownership, and thus become entitled to receive dividends, to vote at elections, and to enjoy all the privileges of ownership, it would be inequitable to allow him to refuse the responsibilities of a stockholder.

We submit, then, as a fair deduction from a review of the authorities relied upon by the learned court in Missouri, that they wholly fail to sustain the proposition upon which that opinion is based. It is not correct to say, as that learned court says in conclusion, that the denial of the defendants' liability under the circumstances would be permitting them to play fast and loose, to enjoy all the benefits and emoluments of stockholdership, without shouldering its inseparable burden —to be a stockholder to vote, but not a stockholder to pay—because defendants really enjoy none of the benefits or emoluments which would have pertained to the stock if it had been regularly issued stock held by them as their own property. They hold nothing but the naked title manifested by the certificate, accompanied by documents which showed that it was a mere deposit with them as custodians for safe keeping; and the only entry in the transfer book of the company by which it was credited to them as in escrow, showed to all whom it might concern that they had no personal or beneficial interest therein.

Finally, it is not pretended, and cannot be upon the special findings, that the plaintiff gave credit or changed his position, or in any manner relied upon a belief created by the voting of the stock, that the defendants had undertaken to pay for it, or had become liable as subscribers for the amount represented by it.

There is no authority for the proposition stated in the Fifth Point of the plaintiff in error, that the mere fact of stock standing in the name of a party, conclusively fastens upon him liability, without regard to the circumstances under which the stock is held.

The two cases cited from the English reports arose under the Companies' Act (25 and 26 Vict.), and go wholly upon the construction of the particular provisions of that act. The parties were held to have consented to their names being placed upon the register of the company as absolute stockholders, under an act which expressly provided that no notice of any trust should be entered upon the register. The cases cited practically construe the act as equivalent to an express enactment that voluntary registration on the book of the company as a stockholder should be conclusive that the party should be a contributory to calls.

And in *Allibone* vs. *Hagar*, 46 Pa. St., 48, as in *Sanger* vs. *Upton*, where it is cited with approval, the defendant *actually subscribed* for the stock.

All the cases cited under plaintiff in error's sixth point will be found to fall far short of the proposition for which he contends. In most of them the party seeking to escape liability had actually claimed to be a stockholder, but sought to take advantage of some technical defect in the organization of the company, or in his title to the stock, or in the method by which he acquired it, or they were cases where a pledgee of stock had voluntarily caused the stock to be transferred to his own name, and so discharged the pledgor, or where the party had performed acts which were inconsistent with any other view than that he intended to be, and to be regarded by others as the real and beneficial owner of the stock.

There is a radical distinction between this case and all the cases in which persons holding stock have been held liable to pay for it at par, notwithstanding private agreements that they should pay less than this, or not pay at all. In all those cases the parties *received the stock as beneficial owners*, and if they were not held liable to pay for it, *it would not be paid for at all*, and so much of actual and existing capital would be *withdrawn from creditors*, whereas in this case we were merely temporary custodians of the stock in trust for a limited period, on the expiration of

which it would go back to the company, which might thereafter issue it to actual subscribers and get full pay for it. There was to be no withdrawal from the creditors by creating and keeping out stock which was not to be paid for.

The present case is also clearly distinguishable in principle from all those in which a specific amount of stock was required to be actually subscribed, and where the stock in question in the case formed part of the amount so required and was so held out or treated.

In this case the 60,000 shares were merely part of the "authorized" capital which the company *might issue if or when it pleased, or not at all.*

It must, furthermore, not be confounded with any of those cases, whether English or American, in which a "*duplicated*" liability was imposed upon all those who were, or upon the official register by law required to be kept properly appeared to be, the legal owners of the company's capital stock. That is a liability specifically imposed by statute upon the owners, or legally apparent owners, of all the shares. This is an alleged liability to pay for stock as purchasers or subscribers, not resting upon statute, and must be based upon either

1st. Actual subscription, purchase or beneficial taking as proprietors or—

2d. Such a holding out to the person claiming the existence of liability as to create a legal or equitable estoppel in his favor against the apparent shareholder, and there can never be any such legal or equitable estoppel when in fact there was no subscription, purchase, or taking of the stoek as owner, and where the real facts were known to the party asserting the liability.

In the cases where voting was held to be an element in an estoppel against the party voting, he was, or claimed to be, or was supposed by the party asserting

his liability to be, the real owner of the stock; but where, as in this case, the facts as to his holding of the stock are established beyond dispute, and such holding is merely in trust for the company and not beneficial, and the right of voting is held to be by law denied to holders of stock upon such a trust, the fact of voting by such a holder does not at all show or tend to show it was not in the character which otherwise clearly appears, but merely that he mistook the legal right in respect of voting which belonged to such holding in trust.

Seventh Point.—The claim of the plaintiff that the adjudication in Missouri in the suit of *Griswold*, and in one or two other suits that followed it, is conclusive upon the judgment of the court in this case, is, we submit, utterly without foundation.

(*a.*) It is not true that the judgment of the Federal Court is bound or in any manner constrained by a judgment of the court of the State in which the corporation had its existence.

On questions of the construction of the Constitution or peculiar statutes of a State, the Federal Courts acquiesce in the settled decisions of the courts of last resort in the State in question, but not on a question of general law or equity such as is involved in the present case. Whether it be regarded as a question of liability arising from holding stock or from an agreement with the company to be a stockholder, or from conduct creating an estoppel whether against the company or against creditors of the company, it is not a State question or a local question, but one of general jurisprudence, on which the judgment and action of the Federal Courts are absolutely independent of the decisions of the State Courts, and only to be influenced by them according to the force of the reasons upon which they are based. They are entitled to con-

sideration and influence, *haud ratione imperii, sed imperio rationis.*

(*b.*) This action does not arise upon, nor is it to be governed by, the provisions of the statute of Missouri. It is clear that the courts of Missouri, so far as they have held the defendants in other cases, have not pretended to hold them by force of any statute, but simply upon general principles of law and equity, grossly misapplied, as we have attempted to show.

The only resort to any provision of the statute at all was not by the complainants to create the liability against the defendants; but was on their part to avail themselves of a clause of the statute by way of defense.

But even here there was no question of statutory construction involved. Even in weighing the defense so attempted to be set up, the question was not of construction, but of the effect of the statute, and whether the defendants and their transactions came within its terms.

Whether the situation of the defendants, in relation to the stock, was a holding as collateral security, was just as much a general question of law or of equity as would be the question, whether a particular document in evidence was a bill of exchange or a promissory note, and on such a question, being in its nature a general question of law, the judgment of the Federal Court must necessarily be independent.

(*c.*) The mere fact that a clause of a State statute is incidentally involved in this way, is not enough to impart to a judgment of the State Courts peculiar sanctity or authority in regard to the question when raised in the Federal Courts. The authorities to this effect are clear and conclusive.

Town of Venice vs. *Murdock*, 92 U. S., 501, the court said: "It is argued, however, that the New York decisions are judicial constructions of a statute of that State; and, therefore, that they furnish a rule by which

we must be guided. The argument would have force if the decisions, in fact, presented a clear case of statutory construction; but they do not. They are not attempts at interpretation. They would apply as well to the execution of powers or authorities granted by private persons as they do to the issue of bonds under the statute of April 16, 1852. Tney assert general principles, to wit, that persons empowered to borrow money and give bonds therefor, for the purpose of paying it to an improvement company, are not authorized to deliver the bonds directly to the company; a doctrine denied in this court, in the Supreme Court of Pennsylvania, and even in the Court of Appeals of New York. *People* v. *Mead*, 24 N. Y., 124; *The Town of Venice* v. *Woodruff et al.*, 62 *Id.*, 462. They assert, also, that where an authority is given to an officer to execute and issue bonds (on the assent of two-thirds of the voters of a town, the assent to be obtained by the officer and filed in a public office, with an affidavit verifying the assent), the verification amounts to nothing, subserves no purpose, and that a *bona fide* holder of the bonds is bound to prove that the requisite number of voters did actually assent. They assert this as a general proposition. They do not assert that the statute so declares, or that such is even its implied requisition. There is, therefore, before us, no such construction of a State statute by State courts as requires us to yield our own convictions of the right, and blindly follow the lead of others, eminent as we freely concede they are."

In *Township of Pine Grove* v. *Talcott*, 19 Wall., 677, the court says: "It is insisted that the invalidity of the statute has been determined by two judgments of the Supreme Court of Michigan, and that we are bound to follow those adjudications. We have examined those cases with care. With all respect for the eminent tribunal by which the judgments were pronounced, we must be permitted to say that they are not satisfactory to our minds. We think the dissenting opinion in the one first decided is unanswered. Similar laws have

been passed in twenty-one States. In all of them but two, it is believed their validity has been sustained by the highest local courts. It is not easy to resist the force of such a current of reason and authority. *The question before us belongs to the domain of general jurisprudence. In this class of cases this court is not bound by the judgments of the courts of the State where the cases arise.* It must hear and determine for itself Here commercial securities are involved." (The Michigan cases referred to and cited in the foot note, are: *The People* v. *Salem*, 20 Mich., 452; *Bay City* v. *The State Treasurer*, 23 *Id.*, 499.)

In *Olcott* v. *The Supervisors*, 16 Wall., 689, the court said: "It is undoubtedly true in general, that this court does follow the decisions of the highest courts of the States respecting local questions peculiar to themselves, or respecting the construction of their own constitutions and laws. But it must be kept in mind that it is only decisions upon local questions, those which are peculiar to the several States, or adjudications upon the meaning of the constitution or statutes of a State, which the Federal courts adopt as rules for their own judgments. That *Whiting* v. *Fond du Lac County* was not a determination of any question of local law is manifest. It is not claimed to have been that. But it is relied upon as having given a construction to the Constitution of the State. Very plainly, however, such was not its character or effect. The question considered by the court was not one of interpretation or construction. The meaning of no provision of the State Constitution was considered or declared. What was considered was the uses for which taxation generally, taxation by any Government, might be authorized, and particularly whether the construction and maintenance of a railroad, owned by a corporation, is a matter of public concern. It was asserted (what nobody doubts) that the taxing power of a State extends no furher than to raise money for public use, as distinguished from private, or to accomplish some end public in its nature; and it was decided that build-

ing a railroad, if it be constructed and owned by a corporation, though built by authority of the State, is not a matter in which the public has any interest of such a nature as to warrant taxation in its aid. For this reason it was held that the State had no power to authorize the interposition of taxes to aid in the construction of such a railroad, and, therefore, that the statute giving Fond du Lac County power to extend such aid was invalid. This was a determination of no local question, or question of statutory or constitutional construction. It was not decided that the Legislature had not general legislative power, or that it might not impose or authorize the imposition of taxes for any public use. Now, whether a use is public or private is not a question of constitational construction; it is a question of general law. It has as much reference to the Constitution of any other State as it has to the State of Wisconsin. Its solution must be sought, not in the decisions of any single State tribunal, but in general principles common to all courts. The real nature of taxation, what uses are public and what are private, and the extent of unrestricted legislative power, are matters which, like questions of commercial law, no State court can conclusively determine for us. This consideration alone satisfies our minds that *Whiting* v. *Fond du Lac County* furnishes no rule which should control our judgment, though the case is undoubtedly entitled to great respect." (*Whiting* v. *Fond du Lac County* is in 25 Wisconsin, 188.)

The question of what constitutes a subscriber to or owner of stock, and of the effect of a vote by a party not a stockholder, or not lawfully entitled to vote upon his liability, is just as much a question of general jurisprudence as any question of commercial law, and the decisions of this court in very recent cases have emphatically asserted its right to an independent decision upon its own judgment, notwithstanding the decisions of the courts of the State where the controversy arose.

Vide R. R. Co. v. *Nat Bank*, 102 U. S., 14; *Oates* v. *Nat. Bank*, 100 U. S., 239; *Swift* v. *Tyson*, 16 Pet., 1.

These and many other authorities that can be cited do fully establish the doctrine contended for by us, that the judgment of this court must be exercised with the same independence of the decisions of the court of Missouri as of those of any other tribunals. If those decisions are founded on reason and justice, they should be followed. If it shall be found that they distort the law, and that the authorities on which they rely wholly fail to support the propositions which lie at the foundation of their judgment, it may well be considered that in this instance the local courts have acted from local bias, as is not unprecedented where their interposition is invoked by domestic creditors against aliens or citizens of other and distant States who may be supposed to be able to respond without ruin to the satisfaction of the claims of such creditors. The court does not need to be reminded of the frequent instances in which it has had to come to the rescue of aliens and citizens of other States who were thus sought to be made the victims of local prejudice and interest.

(*d.*) But there is another consideration of great weight which we urge upon the earnest attention of the court, viz.: that the decisions in Missouri relied upon by the plaintiff were subsequent to the decision of this case by the Circuit Court.

And in this connection we call the attention of the court to the doctrine laid down by it in *Pease* v. *Peck*, 18 How., 599, where the court says: "Nor do we feel bound, in any case in which a point is *first raised in the courts of the United States*, and has been decided in a Circuit Court, to reverse that decision contrary to our own convictions, in order to conform to a State decision made in the mean time. Such decisions have not the character of established precedent declarative of the settled laws of a State."

Eighth Point.—As to the suggestion that the election of Joseph Seligman as a director in 1874, made the defendants liable for the six million dollars, we need only refer to the express provisions of the Missouri statute already quoted which made that election absolutely illegal and void. He could possibly take nothing by the election. "*No person shall be a director unless he is a stockholder owning "stock absolutely in his own right and qualified to vote for "directors at the election at which he shall be chosen.*"

Besides, so far as the plaintiff is concerned, it is clear that his rights had culminated; his transactions with the company had ceased; his work under his contract had come to an end long before that election, and there can be no pretense of his having relied in any way upon it.

Ninth Point.—But even though the defendants might have been held liable as stockholders in the absence of a positive statutory exemption from such liability, section 771 of the Revised Statutes of Missouri of 1879 declares that "*No person holding stock in any such company as trustee, and no person holding such stock as collateral security, shall be personally subject to any liability as stockholder of such company.*"

This section clearly exempts from liability all persons holding stock in a fiduciary capacity. The exemption is absolute, and is not dependent upon the fact that there is no *cestui que trust* to answer to the liability under the latter clause of the section. The only way in which the learned court in Missouri avoids the natural effect of this statutory exemption is by insisting that, *since the stock has never been issued*, there is no one in *esse* who could be made personally subject to liability as a stockholder, and therefore it concludes that the defendants, in whose name the stock stands, must submit to that liability.

But if this reason is well stated, it is in direct har-

mony with the main feature of the argument that we have attempted to present, viz.: that the stock in question *never was issued at all;* never was severed from the original right in which the company held it, and in which it holds all stock within its capital that it is authorized to issue; that it never ceased to be company's stock; and, therefore, the defendants never could become in law or equity the holder or owner of it in the sense of that ownership or holding which is necessary to create liability as upon a subscription.

It is not, however, correct to say that the theory of the law is that there must be some person or estate always ready to respond to the demands of creditors for all stock up to the limit of the charter. The law contemplates no liability—no trust fund for the payment of creditors, except so far as the stock is really and substantially severed from the company, and vested in others as owners thereof. Until then there is a mere possibility of its future issue if purchasers can be found; a mere contingent possibility that a trust fund may be created out of it.

The fact that there is no pledgor, if such be the fact and that, secondly, there is no pledgee, upon which the learned court relies, shows conclusively that there never has been a time when this stock really passed from the original ownership by which the company held it.

But if for any purpose or in any manner it can be regarded as in fact transferred to or vested in the defendants, it was solely as trustee for the company—for the bonds—for the other stockholders—for all parties concerned.

The case of *Matthews* against *Albert*, 24 Maryland, 527, under a statute identical with that now in question, is directly in point in our favor. In that case, the corporation itself issued the stock as collateral security for a debt, and the holder of the stock was sought to be made liable. It was held expressly, that by virtue of the section in question, he was exempt from liability.

There was a direct loan of money to the company, and the stock was held as a pledge for its payment.

The same point was there made as here, that there was no pledgor; but the court observed: "That, in our opinion, his (the pledgee's) claim was for money loaned, and that that stock transferred to him was held as collateral security for his loan, and so holding it, he is not personally liable for any liability as stockholder, but is protected by the provisions of the Act of 1852."

The learned court will not be misled by the earlier New York cases, where actual stockholders, actual holders of issued stock, though only as trustees or collateral, were held liable as subsrcribers.

The case of *McMahon* agst. *Macy*, 51 New York, 155, decided since the adoption of a similar statute in that State, shows clearly the view taken of such a statute by the courts of New York, and that under it, no matter what may be the form of the certificate, no matter in what form the title may be entered on the books of the company, it is always open to proof of the actual fact that the stock in question is really held by the party sought to be charged as collateral security.

We regard the defense of the defendants as complete, without reference at all to this clause of the statute, and only refer to it in the event of the court's entertaining doubt upon the defendants' position independent of this clause.

We submit that the extraordinary view taken of the clause by the Supreme Court of Missouri only affords further warrant for the suggestion already made, that that learned court yielded in this case to the not unprecedented sentiment by which the court of a State is influenced, where numerous unfortunate creditors of a corporation reside who are claiming to enforce a liability against aliens or residents of other States who may be supposed to be able to fill the roll of victims.

There is no reasonable, necessary or natural connection or dependence between the two clauses of the statute relied on. The first, which exempts the

trustees or holders of stock held in trust or as collateral from liability, is absolute and peremptory; the second, which imposes the liability upon the party for whose benefit the stock is held, is satisfied by the contingency of there being such a party. It certainly cannot rest upon the corporation itself; and the reason why it cannot is the fact which first and last distinguishes this case from any other in the books, viz., that here, although the stock does stand in the name of the defendants, they have no right or title to it except as naked custodians, holding it temporarily, to be returned to the company before any title other than that of the company can be acquired to it.

Under this clause of the statute the defense set up involves no question of statutory construction.

We all construe the statute in the same way, that none but beneficial holders or owners can be made liable, and the only question is one of common law and common sense, whether these defendants ever stood in the position of beneficial owners, or whether they were, as the contract by which the stock was deposited with them declared them to be, nothing but trustees, and trustees for the scantiest possible purpose, and with the mere right to hold it, viz., as a naked deposit.

Tenth Point.—As between the plaintiff and the defendants no estoppel is raised by the conversation between the plaintiff and Joseph Seligman, which precludes the defendants, as his executors, from denying that they own the stock and are liable as subscribers therefor.

(*a.*) Although this conversation took place before the plaintiff entered into his contract with the company, the special finding is that, long before the conversation, the plaintiff was fully advised of the terms of the contract between the defendants and the company, and he must

therefore have known that the company, and not the defendants, was the owner of the 60,000 shares of stock, and that the deposit with the defendant was a naked deposit, conferring upon them no beneficial interest.

In the light of this knowledge on his part, there is not a single statement attributed to the defendants' testator in the least inconsistent with the facts so already known by the plaintiff.

The plaintiff himself begins the conversation by stating to the testator that he understood that he (Seligman) was interested in the road, and that interest was generally known and understood by them both in the same way, namely, interested as a bondholder, interested as a contractor to furnish the means for equipping the twenty-seven miles already constructed, and holding the deposit of the stock under the terms stated in the contract. What the testator said was: " I think " the best thing you can do is to go on with the work " westward, and we will have ample means to get hold " of the local bonds." Certainly there was nothing in this inconsistent with what they both knew of the Seligmans' actual relation to the road. And then the testator suggested to the plaintiff that he would be safe in going on and entering into such a contract, and mentioned that he thought it would be better for all parties if the road was built and the work prosecuted westward.

As a holder of bonds secured by a first mortgage upon the portion of the road already built, of course the testator was interested in the road, and of course it would be better for him and for all concerned that the building of the road westward from its then terminus at Carthage should be prosecuted and completed.

But how was this in any manner equivalent to an assertion that he was the beneficial owner of the stock which both parties knew he did not own?

The case, in this particular, lacks every element of an estoppel. There was no assertion made which the defendant seeks to change. There was no reliance or change of position by the plaintiff in reliance upon any

such assertion. It was ordinary talk between a party interested as a bondholder and contractor on one finished section of the road with another contemplating the taking of a contract for the work upon another section.

It will be noted that the action is not upon contract, based upon this conversation, but simply against the defendants *as alleged takers of unpaid stock.*

It is an entire perversion to say that *Seligman* recommended *Burgess* to make his contract, as in possible reliance upon him as a stockholder, or as a party interested in the enterprise.

Burgess was already a creditor for work done on a previous section (Finding IX.). Cunningham did not pay him, and he was looking out for payment or security for his present debt, and he went to talk with Seligman about this (same Finding).

Cunningham had represented that the town and county subscriptions were enough to pay for grading the road (*in which only he was concerned*), and it was with reference to this that Seligman suggested that his better course would be to go on with the road, so that these could be made available. (Presumptively, grading had to be done in order to get the town and county bonds.)

Plaintiff's contract was clearly made in this view and with this contemplation. It provided that he should receive his pay in the town and county bonds only.

This contract, the conversation and all the circumstances are utterly inconsistent with the idea that the Seligmans were to be regarded as stockholders for the six millions. If they had been so, this would have afforded of itself an ample fund to pay the plaintiff and everybody else; there would have been no necessity for obtaining the town and county bonds, or selling the mortgage bonds, or anything else.

It is perfectly plain that Burgess at this time knew the true situation of the Seligman stock. He had been fully informed of the contract, and knew its nature, and that the Seligmans' holding was not for themselves, but merely in trust for control.

And nothing ever happened afterwards to justify Burgess in supposing that the *status* of the Seligmans as to the stock had been altered.

Eleventh Point.—The court below committed no error in excluding the evidence of the conversation offered by the plaintiff in error, to show that after the March election, 1873, he was informed by two of the directors who were present at the election that the Seligman stock had been voted.

The contract of the plaintiff with the company, under which all his work was done, was entered into on the 14th day of June, 1872, and the only modification of it was by the supplementary agreement, in writing, of November 20, 1872.

Record, pp. 16, 17.

He must be deemed to have proceeded as far as he went with his work in reliance upon that contract as so modified, and upon nothing else. He was bound to go on with the work according to its terms, and the contract itself shows that his reliance was entirely upon the municipal or town bonds which were to be procured by the company, and that he was to be paid in such bonds, and that a failure on the part of the company to deliver the bonds, or any instalment thereof, as the same became due under the terms of the contract, gave the plaintiff the power to annul and abandon it at his option.

Under these circumstances, it could not fairly have been claimed that the procedure with the work was in any reliance upon the information as to the stock having been voted.

Besides, the radical defect of the plaintiff's case recurs in this connection with full force. He knew the contract under which the defendants held the stock, and

must be deemed to have known that the defendants' voting thereon was a wholly void act, and not with any view or purpose of making the stock their own as against the company.

Although he may have been told that the stock standing in their name had been voted, *he knew when he heard it that they were not owners of the stock, and had no right to become so*, and therefore he could not possibly have inferred that by election they had made it their own.

What more could he have understood than that they had cast an illegal vote? Certainly, he had no warrant for assuming that they had bought the stock or become its beneficial owners, or that their *status* in relation to it had substantially changed. The way it appears to have been spoken of to him clearly implied that it was the trust stock that had been voted upon. It was "*the Seligman stock.*" No one can fairly imagine that he really understood or supposed anything else.

And if it is to be intended that he supposed that the Seligmans, by voting on the stock, *had fallen into a trap*, so that they might thereby be made liable to creditors in general, as if really owners of or subscribers for the stock, and if he counted on being able to spring this trap on them himself, it is sufficient answer to say that therein he certainly mistook the law, so far as respects a right in himself, to found a liability on this act of Seligmans as one of "holding out" themselves as owners, when he knew that in fact they were merely trustees for the company.

The effect of the exception to the exclusion of the evidence of notice to the plaintiff of the vote on the Seligman stock, is simply to require the question of their liability to be disposed of as if the fact offered to be proved had been in fact proved.

Finally, there was no pretence or offer to show that he did any act, in reliance upon the information.

Twelfth Point.—Upon the whole case, therefore, we confidently submit that the complainants have wholly failed to make out the facts necessary to sustain the action as a creditor's bill, or to establish the existence of any trust fund or of the enormous indebtedness of the defendants sought to be fabricated out of the evidence, and that the judgment below should be affirmed with costs.

JOSEPH H. CHOATE,
Of Counsel for Defendants in Error.

17-20

IN THE

Supreme Court of the United States.

[No. 136.]

EDWARD BURGESS, . . *Plaintiff in Error*,

vs.

JESSE SELIGMAN and DAVID J. SELIGMAN, Executors of JOSEPH SELIGMAN, Deceased.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

STATEMENT AND BRIEF FOR DEFENDANTS IN ERROR.

JAMES O. BROADHEAD,
Attorney for Defendants in Error.

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STATEMENT.

This was a suit brought in 1878 by the plaintiff in error against Joseph Seligman and others composing the firm of J. & W. Seligman & Co., upon what purported to be a judgment rendered by the District Court for the county of Cherokee, State of Kansas, on the 5th of November, 1874, in favor of said plaintiff in error, and against the Memphis, Carthage and Northwestern Railroad Company for the sum of $73,661.

The petition in the case avers that on the first day of December, A. D. 1874, the said railroad company was dissolved, leaving the judgment unpaid.

That the capital stock of the corporation consisted of one hundred thousand shares of stock of $100 each; that the defendants in their firm name were at the date of said dissolution stockholeers of the said capital stock, holding sixty thousand shares of the stock of the nominal value of $6,000,000, and, that at the date of said dissolution and judgment, there was due and unpaid on said stock the sum of $1,000,000. The plaintiff in error asked judgment against defendants in the sum of $73,661, with interest at seven per cent. as provided by the laws of Kansas.

Defendants denied the judgment, and denied that the corporation was dissolved.

They further denied that they, or either of them, were stockholders of the capital stock of the railroad corporation referred to, holding 60,000 shares, or any number of shares.

And further answering they say that in the year 1872 the railroad corporation referred to issued certain bonds to the amount of about $800,000, secured by deed of trust on the property of the corporation; that the firm of J. & W. Seligman & Co., of New York, were made the financial agents of the corporation to negotiate and sell the bonds in the market, and that Joseph Seligman (the only party who was served with process in the cause), was a member of the firm; that Jesse Seligman, one of the members of the firm, was made one of the trustees in the deed of trust; that the bonds were negotiated and sold; that the firm of J. & W. Seligman & Co. made large advances on the bonds, and became holders of the same to the amount of $400,000; that all the property of the corporation, including its railroads, rolling stock, earnings and income were pledged by the deed of trust to the payment of the bonds and interest, and that six millions of the stock of the company was deposited with

the firm of J. & W. Seligman & Co., in trust as additional security for the payment of the bonds, the stock being the property of the corporation to be returned to it, and that neither the defendant nor the firm of J. & W. Seligman & Co., ever subscribed for, bought or held any of the stock of said corporation except as above stated.

Upon the trial of the cause there was a special finding of facts by the court, from which it appears: that the only evidence of indebtedness by the railroad company to Burgess is what purports to be the record of a judgment rendered on the 5th day of November, A. D. 1874, by the District Court of Cherokee County, Kansas, which record is as follows:

Edward Burgess, *Plaintiff*, vs. The Memphis, Carthage and Northwestern Railroad Company, *Defendants.*	No. 1077.

And now, at this day this cause came on for hearing, and it appearing to the court that this action has been settled and compromised, and judgment rendered in favor of the plaintiff as per stipulations filed, which stipulation or agreement is that plaintiff shall take judgment against the defendant for the sum of $73,661. And said agreement further provides as follows: And it is also hereby agreed that the judgment so entered, to-wit: $73,661, will be entitled to a credit of the amount which has been paid to subcontractors and laborers of the said plaintiff, Edward Burgess, by the defendant on that part of the Memphis, Carthage and Northwestern Railroad between Minersville, Missouri, and Oswego, Kansas, when the exact amount thereof has been ascertained, and proper vouchers thereof furnished. This agreement is not to establish the lien prayed for in the petition.

It is therefore by the Court, considered, ordered and adjudged that the plaintiff have and recover of and from the defendant, the amount as above stipulated, together with the costs herein taxed at $15.50, and execution is awarded therefor.

No credits were ever claimed on said judgment.

The stipulation referred to in said judgment is as follows:

On the 16th of October, A. D., 1874, an agreement was filed in words and figures as follows to-wit:

In the District Court of Cherokee Co., State of————, Edward Burgess v. Memphis, Carthage, & North Western Rail Road Co. and others—

It is hereby agreed that a judgment may be entered in the above stated case in favor of plaintiff, for the sum $73,661; and it is also hereby agreed that judgment so entered will be entitled to a credit of the amount which has been paid to sub-contractors and laborers of said plaintiff (Burgess) by the defendant on the part of the Memphis, C. & Northwestern Railroad, between Minersville, Missouri, and Oswego, Kansas, when the exact amount thereof has been ascertained, and proper vouches therefor furnished. This agreement is not to authorize the establishment of a lien prayed for in the petition.

MOFFERTT, O'GRADY & MULLERY,
Attorneys for plaintiff.

Memphis, Carthage & North Western Rail Road Co.
By JAMES BAKER, President.

It also appears from the finding of the Court that on the 14th day of March, 1872, a contract was entered into between the Rail Road Company and the firm of J. & W. Seligman & Co., of New York, reciting that whereas certain municipalities of Missouri and Kansas have made subscriptions to the capital stock of the Rail Road Co, for the purpose of aiding in the construction of the road, amounting in the aggregate to $505,000, and that there would probably be

additional subscriptions amounting to $140,000, and reciting further that twenty-seven miles of the road has been graded, bridged, tied, and the right of way therefor obtained, and all paid for by the Rail Road Co. from the proceeds of the subscriptions mentioned, and as the Rail Road Company seeks additional capital, for the purpose of procuring the iron and equipments for the road by the sale of its first mortgage bonds,—it was agreed between the parties that the Rail Road Company should furnish the capital sufficient to prepare its line of road for the iron, including graduation, bridging, culverts, ties and right of way—and place in the hands of counsel to be selected by the Seligmans all the necessary papers and other legal evidence to secure from said counsel his approval and certificate of the validity of the first mortgage bonds of the company, not to exceed $17,000 per mile, and that the consideration of the advances to be thereinafter mentioned and to be made by the Seligmans, the Rail Road Co. agreed to execute and deposit with them its entire issue of first mortage bonds, and also to deposit with them (the Seligmans) a majority of the capital stock of the company authorized to be issued, the said stocks to remain in the control of the Seligman's "for the term of one year at least." It was further stipulated that the Seligman's should purchase 2000 tons of railroad iron under the direction of the company, and from time to time make such advances of cash during the completion of the road to Carthage, as should not with the money paid for railroad iron exceed the sum of $200,000, and that for all advances the Seligman's should receive seven per cent interest, until re-imbursed by the sale of the bonds.

There were other provisions in the agreement of March 14th, 1872, not necessary to be mentioned.

On the first of May, 1872, in pursuance of the agreement, a resolution was passed by the board of directors to borrow money and mortgage the property of the company, and a trust deed was executed to secure the payment of the bonds,

in which Jesse Seligman and John H. Stewart were made trustees.

On the 11th of May, 1872, a resolution of the board was passed as follows: "It is ordered by the board of directors that in making negotiations for money with J. & W. Seligman & Co., that certificates for a majority of the stock of this company be issued to said J. & W. Seligman & Co., to hold in trust for the period of twelve months, and that such certificate be signed by the president and secretary with the corporate seal of the company affixed." And on the 28th of the same month a certificate of stock for $6,000,000 was accordingly issued. A list of stock made out by the secretary of the company contained the name of J. & W. Seligman & Co., and the stock transfer book containing the names, residence, date, number of shares and amount in dollars of the stock of the company, had the following entries, among others:

Name.	Residence.	Date.	No. of Shares.
J. & W. Seligman.	New York,	Dec. 20, 1872,	60,000 (held in escrow.)

$864,000 of the bonds were issued and sold by J. & W. Seligman & Co., of which they took $400,000 at 65 cents on the dollar—$260,000.

In March, 1873, the stock held as above stated by J. & W. Seligman & Co , was voted by proxy.

In June, 1872, Burgess made a construction contract with the railway company, for the construction of the road from Carthage, Mo., to Independence, Kansas, and continued the work until the fall of 1873.

In December, 1874, the road was sold under the deed of trust, and Joseph Seligman and Josiah Macy, as bondholders committee, became the purchasers. At the date of of the trustees sale, there were 44 miles of railroad in running operation, and 27 other miles partially completed. The work done by the plaintiff, Burgess, was for grading, masonry, paving, grubbing and cleaning, including the fur-

nishing of materials therefor; the distance, according to the contract, on which this work was to be done, was eighty-three miles.

By the terms of the construction contract, it was agreed that Burgess should, in lieu of cash, take bonds of any towns, townships or counties of the States of Missouri or Kansas, bearing ten per cent. interest or its equivalent, and he was not bound to proceed with the work until the bonds had been first obtained by the company, sufficient to pay for the work.

This contract was made June 14th, 1872, and long before the making of this contract, Burgess was informed of the terms and conditions of the contract of March 14th, 1872, between the railroad company and J. & W. Seligman & Co.

There are other facts found by the court, which it is deemed unnecessary to mention. Upon the state of facts as found, the court rendered judgment for the defendant, and the case is brought up by writ of error.

BRIEF.

I.

The paper offered in evidence, and called a judgment, does not establish an indebtedness against the railroad company for any given amount. The order is that plaintiff have and recover from defendant the amount as above stipulated, and the amount stipulated or agreed upon is $73,661, less the amount which has been paid to subcontractors and laborers, when the exact amount thereof has been ascertained, and proper vouchers therefor furnished. No time is fixed when this amount of credit is to be ascertained, but that the judgment is entitled to some credit, there is no doubt. If so, how is the plaintiff to collect the whole amount, and if not the whole amount, then what amount? The plaintiff

sues for the whole amount of this judgment, and asks judgment for the whole amount. He does not aver that the judgment is not entitled to any credit, nor does he state what amount of credit, if any, the judgment is entitled to. The proof varies from the averments in the petition.

The suit is upon a judgment. Suppose it had been upon a note for $5,000, and the note, besides containing the promise to pay $5,000, had recited further that "this sum of $5,000 is entitled to a credit for the amount which has been paid to subcontractors and laborers of plaintiff by the maker of the note, when the exact amount has been ascertained, and proper vouchers thereof furnished," could the plaintiff recover the $5,000 on the note without averring that in truth and in fact it was entitled to no credit, and that the whole amount of $5,000 is due, notwithstanding the recital in the note.

The variance in this case is fatal to a recovery on the petition as filed.

See :—

Jacobs v. Finkel, 7 Blackford, 432.
Ivey v. Brindlinger, Litt. (Ky.) Select Cases, p. 85.
Rogers v. Estis, Litt. (Ky.) Select Cases, 2.
Banister v. Weatherford, 7 B. Mon. 271.
Hilt v. Campbell, 6 Maine, p. 109.
Foster v. Pennington, 32 Maine, 178.
Gragg v. Frye, 32 Maine, 283.

II.

The section of the statute of Missouri, under which this suit was instituted, provided that :

"If any company formed under this act dissolve, leaving debts unpaid, suits may be brought against any person or persons who were stockholders at the time of dissolution, without joining the company in such suit."

The court finds in this case that the corporation was dissolved in December, 1874, within the meaning of the statute of Missouri, authorizing proceedings by creditors against stockholders — that is, that the corporation was insolvent.

When the statute says that suits in such cases may be brought against any persons who were stockholders at the time of the dissolution, it means any persons who, as stockholders were indebted to the company for unpaid subscriptions to the stock of the company, there being at that time no double liability on the part of stockholders.

See Schricker v. Richings, 65 Mo. p. 215.

The question then is:

Whether the Seligmans were at the time of the dissolution indebted to the company on account of an unpaid balance on account of their subscription to the capital stock of the company?

(*a.*) It is not pretended that they ever subscribed to the stock of the company, or that they ever became indebted to the company by virtue of any agreement on their part to pay for the stock, or that they purchased the stock from any one else who had subscribed, and whose stock subscription remained unpaid.

The contract and the only contract in reference to the matter between them and the corporation is the written contract of the 14th of March, 1872 (p. 6 of the Transcript), set out in full the finding of the court, and that contract excludes the idea that they were to become indebted to the company on account of this stock; for it declares that the railroad company agrees to deposit with them its entire issue of first mortgage bonds in consideration of the advances hereinafter mentioned, and for the same consideration the company "*also agrees to deposit with the party of the second part* (the Seligmans) *a majority of the capital stock authorized to be issued, said stock to remain in the control of the said party of the second part for the term of one year at least.*"

And the resolution of the board of directors of May 11th, 1872, carrying out the provisions of the contract, and which may be taken as constituting a part of the contract, provides:

"That in making negotiations for money with J. & W. Seligman & Co., that certificates for a majority of the capital stock of this company be issued to said J. & W. Seligman & Co., to hold in trust for the period of twelve months, and that such certificates be signed by the president and secretary, with the corporate seal of the company affixed," and a certificate was accordingly issued.

They were by this contract to hold the stock in trust, and to hold it for twelve months. To say that such a holding was an absolute holding or ownership of the stock, is absurd. The contract fixed absolutely and indisputably the terms on which this certificate of stock was held — it was held in trust — it was held for a limited period of time; for while the contract of March 14th says: "for the term of one year, at least," the resolution of the board, fixing the time, says: "*for the period of twelve months.*"

The company never parted with the stock absolutely. It was simply deposited, to be returned at the expiration of a certain period of time, but the company lost control of it for the time being, and in such form that it could not be issued to any one else; and this was the security of the Seligmans. The bonds were held in the same way, and they were made the financial agents for the sale of them. They did not own the bonds, nor did they own the stock, but it was provided that they might take any portion of the bonds at 70 cents on the dollar. But they could hold this stock only for twelve months. Nor were they authorized by the terms of the contract to purchase or take the stock, as they were in regard to the bonds. They were to hold it only, and at the end of that time it became again the property of the company.

It will be perceived from the terms of the contract that the Seligmans, by the 4th clause of the contract, had the privilege for twelve months to call the bonds, or any portion of them—that is, to take them at 70 cents on the dollar—and that, by the 5th clause, if the bonds were not sold within twelve months, the company was bound to pay back to the Seligmans the money advanced by them under the contract at seven per cent. interest; and that they could, by the resolution of the board, only hold the stock for twelve months. But one condition was not dependent upon the other; the right to hold the stock was defeated at the end of the twelve months, and the stock then became absolutely the property of the company; indeed it was always the property of the company, without the power, however, to issue it to any one else during the period of time it was deposited with the company.

It is clear, then, that the taking of the stock certificate by the Seligmans was as a temporary deposit merely; at the time of the deposit, the stock was of no value, but the Seligmans were to make certain advances of money, and as this money was advanced and work done on the road, the stock became more valuable, and to avoid the possibility of its being issued by the company for a nominal consideration merely, the Seligmans were authorized to hold it for twelve months, which was the time contemplated within which the bonds might be sold, and the Seligmans reimbursed for the money advanced; they would then become secure, and it then mattered not to them what became of the stock.

It may be important here to inquire what is the character of this unissued stock, and the rights of the respective parties thereto.

It is not pretended that under the arrangement made between the parties, the Seligmans had the right to sell the stock, or to pledge it or otherwise dispose of it, or to hold it in consideration of the advances made for iron for construction, which, by the provisions of the *third* clause of

the contract, was not to exceed $200,000, because if they were to hold it as a deposit for twelve months, and only as a deposit, this could not have been the intention of the parties.

Neither could the Seligmans vote it, or exercise any act of ownership over it, because this also would be inconsistent with the letter and spirit of the contract.

Such stock could not legally be voted either by the company, or by the parties holding it in trust for the company.

In Dayton & Cincinnati R. R. Co. v. Hatch, 1 Disney, 96, the court says:

"What, then, are the rights of an organized company over its unsubscribed stock? It appears to me that, in the absence of any legislative provision, it has simply and plainly, so far as respects the power of disposition, the rights of an ordinary owner, the same rights which it would have over any portion of the subscribed stock, which might be transferred to it in the payment of a debt, or otherwise. From the nature of the interest in it, such stock cannot be voted."

In Brewster v. Hartly, 37 Cal., p. 16, ten thousand shares of the company's own stock had been issued to a trustee for Wells, Fargo & Co., to secure past and future advances, with authority to vote thereon, the court said: "It is not claimed that McLean had any right to sell the stock, but it is admitted that he is to hold it until the money is paid, and thereupon to transfer it to the company," and following the decision of the court in *Ex parte* Holmes, 5 Cowen, p. 426, where it is held that stock held in this way cannot be voted, proceeds to say:

"This doctrine must command the assent of every one, unless it can be shown that a corporation can become a stockholder, in the sense of the statutes, of its own stock, receiving from itself dividends, and responding to itself for calls for assessments, and being responsible for the debts

of a corporation, first, as a corporation, and second, as a stockholder."

McLean, in this case, had voted the ten thousand shares and carried the election. The court set aside the election, and held that the unissued stock was not, in any proper sense, the property of the corporation, but that it could only be issued in payment of the indebtedness of the company, or to those who purchased and paid for it; that the corporation could not vote it, or authorize any one else to vote it.

See also upon this point the case of American Railway Frog Company v. Haven, 101 Mass. 398.

Under the authority then of the contract between the parties, the Seligmans could neither vote the stock, nor sell it, nor pledge, nor receive dividends on it; in other words they were not the owners of the stock, but held it simply in trust, or if you please in *escrow*, as appears by the entry on the books of the company, to be delivered back at a certain time.

III.

But the plaintiff in error claims that the Seligmans, by their subsequent conduct after the deposit of the stock with them, have become the owners of the stock, and have become liable as such to the company and to creditors.

The agreement between the parties has been commented upon. It is plain and unquivocal, and there is nothing in the testimony to show any new agreement or any modification of the terms under which the certificate of the stock was held, nor any act of the parties by which such a modification of the original contract may be implied. It is true that the Seligmans voted the stock, but they had no right to vote it, and any stockholder might have instituted proceedings in court and had the election set aside.

See Sec. 722, Vol. 1, Revised Code. of Mo., p. 119.

And surely it can not be held that the voting of the stocks under a mistake or otherwise, gave them any right to the stock,or changed the contract between the parties,or created a new contract or understanding between the Seligmans and the company, that they should in consideration of having been permitted to cast that vote, pay the company six millions of dollars, the par value of the stock. They doubtless thought they had a right to vote the stock, just as an ordinary trustee might vote stock held by him in trust, but it would be absurd to suppose that they intended to put themselves in the same attitude by voting, as if they had subscribed that amount to the capital stock of the company. At the time this stock was voted, the Seligmans had advanced the money provided for by the terms of the contract of March 1872 ; they had taken some of the bonds of them, but the company had failed to pay the interest as appears by the resolution of the board in evidence ; and it is quite natural that the Seligmans would take every available step to secure themselves for the money advanced ; but if they were subscribers to the stock to the amount claimed and became liable as stockholders to that amount, there would have been no difficulty in paying the interest on the first mortgage bonds, and the company knew that as well as they did, so that it is folly to suppose that they intended any such thing or that the company understood it in that way ; and if the act of voting is held to constitute a new contract, it is a contract not made by the parties, but by the court.

IV.

The next question, and the one which is pressed with more earnestness than any other, is whether the defendants, not having agreed to be stockholders or to pay for the stock, have by reason of their conduct subsequent to the agreement become stockholders by estoppel ; in other words whether they are not estopped from denying that they are

stockholders in the sense of the statute of Missouri, and as such liable for the debts of the company?

(*a*) There can be no better definition of the doctrine of estoppel *in pais*, than that given by Judge Norton of the Supreme Court of Missouri in his dissenting opinion in the case of Griswold v. Seligman, 72 Mo. R. p. 114 to 129, involving a similar question to the one now before this court. In that Griswold sought to hold these defendants liable as owners of the same stock, and the majority of the court held that they were so liable. Judge Norton says: "To establish an estoppel *in pais*, it must usually appear first, that one party has made an admission or assertion inconsistent with the evidence proposed to be given, or the claim offered to be set up; second, that the other party has acted upon such admission or assertion; and third, that such other party would be injured by allowing such admission or assertion to be disproved."

An estoppel does not establish any rule or any truth. It simply precludes the proof of the truth in a given case, and grows out of the facts peculiar to that case.

In the case of Ketchum v. Duncan, 96 U S. p. 666, this court says: "An estoppel *in pais* does not operate in favor of everybody. It operates only in favor of a person who has been misled to his injury, and, he only can set it up. * * * So for as it appears, no one of the appellants was so misled. No one of them can claim an estoppel which is personal, and of which only the person misled can avail himself."

Now, in this case no one was misled to their prejudice by the act of voting the stock. The facts, as found by the court, show, that shortly after the execution of the contract of March 14th, 1872, Joseph Shippen, an attorney of St. Louis, saw and examined its provisions, and a few days thereafter told Burgess of the contract, and that thereby the Seligmans were to have control of the road, and of the stock and bonds, and that it would be well for him to have

a talk with Joseph Seligman, before entering into a contract with the railroad company for its construction, and Burgess testifies that before he made his contract of June 14th, 1872, he did have a talk with Joseph Seligman, and then he made his contract with the full knowledge of what the contract of March 14th was, and after a full talk with Joseph Seligman; but all this occurred, and the contract was made before the stock was ever voted. So that he was not induced to make the contract by reason of the Seligmans having voted the stock, and certainly the company was not induced to do anything by reason of this fact.

Then where is the ground for invoking the doctrine of estoppel?

The error committed by the Supreme Court of Missouri in invoking this doctrine, and by the plaintiff in this case as well, is that they confound those facts which under other circumstances might tend to show an implied contract to become a stockholder, with those which would operate as an estoppel. The cases referred to by Judge Sherwood, in delivering his opinion, are all cases where the courts hold that the facts established make an implied contract to become a stockholder, in the absence of any express contract on the subject. Such are the cases of Railway Company v. Graham, 2 Eng. Ry. Cases, 870, and Railway Company v. Gomstone, cited in the opinion, in one of which the defendant, who though not a subscriber, had paid a call as such, and the other where the defendant had attended the half-yearly meetings of the proprietors, and acted as one of them, were both held to have been estopped from denying their membership. The word estoppel is not used in its legal, technical sense — it means that the parties have so acted as to raise an implied contract to become members of the corporation, and were held as such.

So in the case of Railroad v. Daniel, 2 Eng. Ry. Cases, 728, where Lord Denman says: "All the machinery which the Legislature renders necessary to constitute a member, is

in this instance dispensed with by the conduct of the parties." And in the case of Railway Company v. De Medina, 2 Eng. Ry. Cases, 735, where the defendant had paid calls on some shares, and begged time as to others; and in Maguire's Case, 3 De G. & Small, p. 31, where it was held that the beneficial use of the stock will render the person using it liable as a shareholder.

And so of the American cases cited, Railroad Co. v. Stewart, 41 Pa. St., p. 54, where a party had voted at the annual meeting of directors, was himself elected as director, acted in that capacity and as a stockholder, and paid money to the company. These facts, the court says, warranted the presumption that he had resumed his original obligation as a stockholder; also case of Chase v. Bank, 19 Pickering, 584, where the party had voted at parish meetings, and acted as trustee of parish funds; and the cases decided by this court of:

Webster v. Upton, 91 U. S. 65.
Upton v. Tribblecock, 91 U. S. 45.
Sawyer v. Upton, 91 U. S. 56,

with which this court is familiar; as well as the case of

Bank v. Goodman, 9 Cushing, 576,

all holding to the doctrine announced by the Supreme Court of Missouri in the case of

Griswold v. Seligman, 72 Mo. 117,

"that wherever — to use the language of that court — a party, in consequence of his course of conduct, by his acts and representations, is deemed a stockholder towards the company, he is likewise, and for the same reasons, precluded from denying his liability as to creditors." We do not deny this doctrine, but it does not apply to this case, nor did it apply to the Griswold case.

In all the cases cited, there was an absence of any express contract fixing the relations between the individual

and the company, and the courts held that the conduct of the parties raised an implied contract. But where there is an express written contract fixing the exact relations between the parties, how can a court undertake to infer a different contract from the acts of the parties, unless there is something to show a modification of the original contract? In this case the modification proposed would be that the Seligmans, by their act of voting, instead of undertaking to secure the $200,000 they had advanced to the company, intended to render themselves liable to the payment of $6,000,000! !

There is not a single element going to constitute an estoppel in this case, which can be gathered from the conduct of the parties. The agreement was that the Seligmans should not be the owners of the stock; the act was not inconsistent with the agreement; the company took no action upon it, nor was any one misled or damaged by it.

But the question here is whether the plaintiff in error, who alone can invoke the doctrine of estoppel, was misled or damaged; and it would be interesting to know by what ingenious process of reasoning it can be shown, from the evidence in this case, that Mr. Burgess was misled or damaged by the fact that the Seligmans voted this stock on the 1st of March, 1873, for he had already made his contract, knowing at the time exactly what relations the Seligmans bore to the company.

(*b.*) It is claimed that the stock of an incorporated company, is a trust fund for the benefit of creditors.

The full extent of this doctrine is stated by this court in the case of Sawyer v. Upton, 1 Otto, p. 60. The court says:

"The capital stock of an incorporated company is a fund set apart for the payment of its debts. It is a substitute for the personal liability which subsists in co-partnerships; when debts are incurred a contract arises with the creditors that it shall not be withdrawn or applied otherwise than

upon their demands, until their demands are satisfied. The creditors have a lien upon it in equity. If divested, they may follow it as far as it can be traced, and subject it to the payment of their claims, except as against holders who have taken it *bona fide* for a valuable consideration and without notice. It is publicly pledged to those who deal with the corporation for their security. Unpaid stock is as much a part of this pledge and as much part of the assets of the company, as the cash which has been paid in upon it. Creditors have the same right to look to it as to anything else, and the same right to insist upon its payment *as upon the payment of any other debt due to the company.*"

But this doctrine does not in terms or in principle apply to the facts in this case. When the court says the capital stock is a trust fund for the payment of the corporate debts, it simply means the capital stock subscribed, and not the *authorized* capital; until subscribed for, it is no fund at all, and unless an individual is held as a stockholder, either because he has subscribed for the stock, or is held to be a stockholder under an implied contract to be inferred from his acts and conduct, the doctrine cannot apply as against him, and that is the very question in this case, as to whether the owner of stock which constitutes a part of the trust fund for the benefit of creditors.

Thompson, in his work on Liability of Stockholders, says: "The capital stock of a corporation, which is subject to the operation of the rule, that the stock is a trust fund for creditors, consists of all the stock for which the members have subscribed." Sec. 11, and authorities referred to.

The proposition is too plain for discussion.

V.

Section 9, Art. II. of the chapter on corporations, relating to railroad companies (see Wagner's Stat., p. 301, Mo.), provides as follows:

"§ 9. No person holding stock in any such company as executor, administrator, guardian or trustee, and no person holding such stock as collateral security, shall be personally subject to any liability as stockholder of such company, but the person pledging such stock shall be considered as holding the same, and shall be liable as a stockholder accordingly; and the estates and funds in the hands of the executor, administrator, guardian or trustee, shall be liable in like manner, and to the same extent, as the testator or intestate, or the ward or person interested in such fund would have been if he had been living and competent to act, and held the same stock in his own name."

It is claimed that the exemption from liability provided in the first clause of this section, is limited to cases where there is some one to respond to liability under the second clause of the section.

But the first clause of the section referred to is broad enough to cover the case of the trustee, and the statute clearly means that no person is liable unless he holds the stock in his own right. Of course, if he holds it for any one, the person for whom he holds it, and who is the real owner, is and ought to be liable.

The case of Matthews v, Albert *et al.*, 24 Md. p. 527, is a decision in point upon the construction of a statute of that State, of which the Missouri statute is a literal copy—Maryland Code, p. 159, sec. 58.

The identical question raised by counsel for plaintiff here was raised and argued by counsel and decided by the Court in that case. It was a suit in equity wherein the rights and liabilities of several stockholders resting on different grounds were in issue—among others, one W. H. Tieman. He had loaned the corporation $2,000, and, as security for the money, a certificate of stock was issued to and accepted by him absolute on its face, though some time after a mem-

orandum was endorsed on it by the president of the company that it had been "*deposited*" with Tieman as collateral security for the loan. The counsel argued, just as counsel argue here, that the statute did not apply to such a case where the company itself pledged the stock, but the Court decided the other way and we quote its language:

Goldsborough, J., delivering the opinion of the court:

"The claim of W. H. Tieman is for $2,000, money alleged to be loaned to the company on the 8th of Jan., 1859. But it is insisted by the appellees, that Tieman, instead of being a non-stockholder, is, according to the evidence, a stockholder, and as much liable as the Alberts. We do not concur in this view of the relation of Tieman to the company. In our opinion, his claim is for money loaned, and the stock transferred to him *was held by him as collateral security for his loan, and so holding it, he is not personally subject to any liability as stockholder*, but is protected by the provision of the 12th section of the Act of 1852, ch. 338."

Now, in the case before the court, if there was no stock at all, if the company had no authority to issue the certificate, then there is no liability. If, on the other hand, the company had the authority to put so much of the unissued capital stock in the hands of defendants to hold as a deposit for twelve months, and then to be returned to the company, whatever the object might have been, whether as security for the money to be advanced, or to prevent the company from issuing it to others, so that others should not get control of the company for that period of time, at least, the defendants became trustees; they held the stock in trust; they did not have any present beneficial ownership in it, and were not liable as stockholders according to the provisions of the statute above referred to.

The decision of the Supreme Court of Maryland ought to have great weight in determining this question, inasmuch as the statute which received this construction from the Maryland courts was afterwards copied and adopted by the State of Missouri.

VI.

There is only one other qnestion to be considered, and that is, as to the weight which the decision of the Supreme Court of Missouri in the case of Griswold v. Seligman ought to have upon this court. In that case a majority of the court held that the Seligmans were liable as stockholders of the Memphis, Carthage and Northwestern Railway Company. See:—

72 Mo., page 110.

It is very evident from the opinion of Judge Sherwood that the questions as to whether the Seligmans were or were not stockholders—that is, owners of the stock—or as to whether they held it in trust, or as to whether the issuing a certificate of stock to them by the corporation, was not under the circumstances, and for the purposes stated, a void act beyond the power of any corporation to go, were not questions of statutory construction, but questions of general law.

What did the contract of March 14th, 1872, mean? With what intention, and for what purposes was the certificate of stock issued to the Seligmans? Did the agreement of the parties, or their conduct towards each other afterwards make them the absolute owners of the stock? Was the stock held in trust and for whose use as *cestui que trust*? Did the corporation have power to use the unsubscribed portion of the capital stock of the company for any of the purposes contemplated by the agreement between the parties? are most assuredly not questions to be determined by

reference to the statutes of Missouri. They all belong to the domain of general jurisprudence, and this court has repeatedly held that it is only decisions upon local questions, those which are peculiar to the several States, or adjudications upon the meaning of the constitution or statutes of a State, which the Federal Courts adopt as rules for their judgment.

See :—

Town of Venice v. Murdock, 92 U. S. 501.
Township of Pine Grove v. Talcott, 19 Wall. 677.
Alcott v. The Supervisors, 16 Wall. 689.

We submit, therefore, with the utmost confidence, that the court below committed no error in deciding as they did that the plaintiff in error has no case.

JAMES O. BROADHEAD,
Attorney for Defendants in Error.

17-20

OFFICE SUPREME COURT U.S.
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IN THE

Supreme Court of the United States.

[No. 136.]

EDWARD BURGESS, . . *Plaintiff in Error.*

vs.

JESSE SELIGMAN, *et al.*, *Executors*,
Defendants in Error.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

LIABILITY OF STOCKHOLDER

H. H. HARDING,
For Defendants.

with JAS. O. BROADHEAD,
JOSEPH H. CHOATE,
Of Counsel.

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LIABILITY OF STOCKHOLDER.

BRIEF FOR DEFENDANTS.—By H. H. HARDING.

STATEMENT.

The record in this case discloses the following facts:

That sometime prior to March, 1872, the Memphis, Carthage and Northwestern Railroad Company, was duly incorporated under the laws of the State of Missouri, with an

authorized capital stock of ten millions of dollars, for the purpose of constructing and operating a railroad from Pierce City, in Lawrence County, Missouri, westerly through Jasper County, Missouri, and the counties of Cherokee, Labette and Montgomery, in the State of Kansas. That in the beginning, about all the resources the corporation had, were subscriptions of certain municipal townships to its capital stock, with the proceeds of which, it had graded, tied, bridged, and obtained the right of way of the first 27 miles. That it then sought "additional capital, for "the purpose of procuring the iron and equipments for "said Railroad, by the sale of its first mortgage bonds." And that for that purpose they applied to J. & W. Seligman & Co., bankers of New York, to negotiate their bonds, which was the first connection the Seligmans appear to have had with the Company. That on the 14th day of March, 1872, the following contract, in writing, was entered into between the R. R. Co. and the firm of J. & W. Seligman & Co., of the city of New York (of which the defendant then was, and still is, a member):

"These articles of agreement, made and concluded on this 14th day of March, A. D. 1872, between the Memphis, Carthage and Northwestern Railroad Company of Missouri and Kansas, as party of the first part, and Messrs. J. & W. Seligman & Co., of the city of New York, as party of the second part, witnesseth, that: Whereas, in the States of of Missouri and Kansas, certain municipalities and townships have made subscriptions to the capital stock of the party of the first part, for the purpose of aiding in the construction of the Memphis, Carthage and Northwestern Railroad from its intersection with the Atlantic and Pacific Railroad at Pierce City, in the County of Lawrence and State of Missouri, and from thence northwesterly to Carthage, in the County of Jasper in the same State, and thence westerly to Columbus, Oswego and Independence, in the counties of Cherokee, Labette and Montgomery, in the State of Kansas; and, whereas, the party of the first part agrees that at this date, said subscriptions are as follows, to wit:

Pierce City, Lawrence Co., Mo.,	$ 50,000
Sarcoxie, Jasper County, Mo.,	40,000
Marion, Jasper County, Mo.,	125,000
Mineral, Jasper County, Mo.,	30,000
Spring Valley, Jasper County, Mo.,	30,000
Shawnee, Cherokee County, Kansas,	25,000
Crawford, Cherokee County, Kansas,	25,000
Salamanca, Cherokee County, Kansas,	75,000
Lola, Cherokee County, Kansas,	25,000
Oswego, Labette County, Kansas,	80,000
Making a total of,	$505,000

And that additional subscriptions thereto were, in all probability, made on the 7th inst., as follows:

Liberty, Montgomery Co., Kansas,	$ 40,000
Independence, Montgomery Co., Kansas,	100,000
Making additional,	$140,000

And of total subscriptions, actual and probable, the sums of six hundred and forty-five thousand dollars ($645,000) in the bonds of said municipalities and townships; and whereas, that portion of the said Memphis, Carthage and Northwestern Railroad, between Pierce City and Carthage, a distance of twenty-seven (27) miles, has been graded, bridged, tied, and the right of way therefor obtained, and all paid for by the party of the first part, from the proceeds of the subscriptions hereinbefore named; and whereas, the party of the first part now seeks additional capital for the purpose of procuring the iron and equipment for said railroad by the sale of its first mortgage bonds, it is hereby agreed between the parties hereto as follows:

First. The party of the first part agree to furnish the capital sufficient to completely prepare its said line of road for the iron, including graduation, bridging, culverts, ties and right of way, and will place in the hands of counsel, to be selected by the party of the second part, all the necessary papers and other legal evidence to secure from said counsel his approval and certificate of the validity of the first mort-

gage bonds of said company, which said bond is to be a seven per cent. gold bond, free of tax, to run thirty years, and not to exceed seventeen thousand dollars ($17,000) per mile.

Second. The party of the first part, in consideration of the advances hereinafter mentioned, made and to be made by the party of the second part, agrees to execute and deposit with the party of the second part, their entire issue of said first mortgage bonds, to-wit: five millions of dollars ($5,000,000), and *also* agrees to deposit with the party of the second party a majority of the capital stock authorized to be issued, said stock to remain in the control of said party of the second part for the term of one year at least.

Third. The party of the second part agree to purchase two thousand (2,000) tons of railroad iron, under the direction of the party of the first part, and from time to time to make such advances of cash during the completion of the road to Carthage, as shall not, together with the sum paid for railroad iron, as aforesaid, exceed the sum of two hundred thousand dollars ($200,000), it being expressly understood and agreed upon that for all such advances or at any other time made, the party of the second part, shall receive interest at the rate of seven per cent. per annum until reimbursed by the sale of the bonds.

Fourth. The party of the first part hereby grants to the party of the second part, for the term of twelve months from this date, the privilege to call any portion of said five millions of first mortgage bonds at the rate of seventy cents currency and accrued interest, less two and one-half (2 1-2) per cent., and in case a larger amount of bonds should be sold than will be needed for ironing the road, *then* the party of the second part shall advance funds for the purchase of rolling stock ($2,000) per mile, and the balance shall remain on deposit with the party of the second part at the rate of interest ruling in New York on call loans, and to be used for the purpose of paying any deficiency in net earnings of said road to meet demands for interest on said mortgage bonds.

Fifth. In the event that by some cause unforseen the party of the second part shall not succeed in the negotiations of said bonds or any part of them during the next twelve months, the party of the first part agrees to repay all sums of money advanced by the party of the second part, with interest at the rate of seven per cent. per annum, and in addition thereto a commission of two and one-half (2 1-2) per cent. on all bonds returned by the party of the second part to the party of the first part.

In witness whereof, the parties hereto have set their hands and seals the day and year first written.

MEMPHIS, CARTHAGE AND NORTHWESTERN RAILROAD COMPANY.

By (Signed) L. P. CUNNINGHAM, *President*.
(Signed) J. & W. SELIGMAN & CO.

In presence of
(Signed) CLINTON B. FISK."

That afterward, to-wit: on the 1st day of May, 1872, in pursuance of said contract, the mortgage bonds of said Railway Company in the usual form, and a certificate of stock for $6,000,000 being a majority of the authorized capital stock of the company (issued to J. W. Seligman & Co.), together with the following certified copy of a resolution of the Board of Directors, to-wit:

"At a meeting of the Directors of the Memphis, Carthage & Northwestern Railroad Company, duly called and held at the office of the company, in Carthage, Missouri, on the eleventh day of May, 1872, the following proceedings were had:

It is ordered by the Board of Directnrs that in making negotiations for money with J. & W. Seligman & Co., that certificates for a majority of the capital stock of this company be issued to said J. & W. Seligman & Co., to hold in trust for the period of twelve months, and that such certificates be signed by the president and secretary, with the corporate seal of this company affixed. E. H. Brown, Sec-

retary of the Memphis, Carthage & Northwestern Railroad Company, do hereby certify that the above and foregoing is a true copy of an order and resolution made and passed by the Board of Directors of said company, at a meeting duly called and held on the eleventh day of May, A. D. 1872. In testimony whereof, I have hereunto set my hand and affixed the corporate seal of said company, at office, Carthage, Missouri, on the 22d day of May, A. D. 1872.

[L.S.] E. H. BROWN, Secretary."

were delivered to or deposited with said J. & W. Seligman & Co., whereupon they made the advances to the Railroad Company called for by said contract.

That said stock so issued and delivered to the Seligman firm was entered on the stock register or transfer book as follows:

"J. & W. Seligman—residence, New York; date May 20, 1872; No. of shares, 60,000 (*held in escrow.*); amount of dollars, $6,000,000."

Which was the only entry ever made on the stock transfer book of the company with respect to said stock.

Although the entire issue of first mortgage bonds, amounting to $5,000,000, had been agreed to be placed with J. & W. Seligman & Co., yet only $864,000 of bonds were in fact issued and were negotiated and sold by J. & W. Seligman & Co., and they themselves became holders of the same to the amount of over $400,000, which they took at the rate of 65 cents on the dollar.

"The defendant, or J. & W. Seligman & Co. never sub-
"scribed for the stock nor agreed to do so, and obtained
"the same only in the manner herein set forth."

That at the stockholders meetings for election of directors of the company for the years 1873 and 1874 the said stock was voted by virtue of proxies executed by J. & W. Seligman & Co., and at the election of 1874 Joseph Seligman, one of said firm, was elected a director, but it does not appear that he ever acted as such.

That on the 5th day of November, 1874, the following entry was made in a cause pending in the District Court of Cherokee County, Kansas, to-wit:

"EDWARD BURGESS, *Plaintiff*, *vs.* "THE MEMPHIS, CARTHAGE & NORTHWESTERN RAILROAD COMPANY, *Defendant.*	No. 1077.

"And now, at this day, this cause came on for hearing, and it appearing to the court that this action has been settled and compromised, and judgment rendered in favor of plaintiff, as per stipulations filed, which stipulation or agreement is, that the plaintiff shall take judgment against the defendant for the sum of $73,661. And said agreement further provides as follows: 'And it is also hereby agreed that the judgment so entered (to-wit: $73,661) will be entitled to a credit of the amount which has been paid to subcontractors and laborers of the said plaintiff, Edward Burgess, by the defendant, on that part of the Memphis, Carthage & Northwestern Railroad between Minersville, Missouri, and Oswego, Kansas, when the exact amount thereof has been ascertained and proper vouchers therefor furnished. This agreement is not to authorize the establishment of the lien prayed for in the petition.'

"It is, therefore, by the court considered, ordered and adjudged that the plaintiff have and recover, of and from the defendant, the amount as above stipulated, together with the costs herein taxed at $15.50, and execution is awarded therefor."

Which is the only judgment ever entered, and is the judgment (so called) on which this suit is founded.

This suit was instituted in the Circuit Court of the City of St. Louis, and was removed by the defendant to the U. S. Circuit Court, where the plaintiff filed an amended petition, the defendant an answer thereto. A jury was sworn, and the case tried before Circuit Judge Dillon and District

Judge Treat; both concurring in the judgment for defendant on the finding of facts made by them, and the plaintiff brings the case here by writ of error.

The petition tenders the naked issue as to whether defendant was a stockholder in the corporation, and the answer takes issue on that question. The answer also denies all the other allegations of the petition as to judgment, etc.

There is a long finding of facts made by the Circuit Court, at request of the plaintiff, in regard to the final foreclosure of the mortgage, sale of the road, purchase by Seligman, etc., which I do not deem it important to add to my statement of facts, because this is simply a suit at law charging defendant liable as a stockholder, and not on the ground of any fraud in the sale or purchase of the road. The foregoing are all the facts which, in my view, bear upon the question of the liability of defendant, under the pleadings in the case.

POINTS OF LAW AND ARGUMENT.

I.

The record introduced by plaintiff of the proceedings in the Kansas Court do not show a judgment. (See Record, p. 14.) The statute of Kansas provides:

"A judgment is the *final determination* of the rights of the parties in an action."

Dassler's Kansas Stat., p. 716, sec. 395. (See 3625 Gen. Stat. Kan.)

The pretended judgment is merely an interlocutory order, reciting an agreement, and there is no final judgment, because there was no final determination of the amount due. Who was to decide what had been paid, and what were proper vouchers? This was not like entering a judgment

for a certain amount, and then providing in the same judgment that, upon the payment of a certain less sum, the judgment was to be satisfied, because, in that case, there would be nothing left to adjudicate. But in this case it might very reasonably be expected that the court would have to adjudicate further, because it would be easy to be seen that there might disputes arise between the parties as to the payments made, and as to what were to be considered proper vouchers; in such case did the Kansas Court intend to leave it, so that the defendant corporation would have to sue out an injunction and multiply suits, when all ought to have been settled in one—surely not.

The defendant, from his position denying that he was a stockholder or member of said corporation, was in no position to claim, in this case, credit on said judgment; only the corporation, or some member of it, could do that. By many courts it has been held than an absolute final judgment was not conclusive against a stockholder, and some of them have held that it was not even *prima facie* evidence of the debt.

Thompson's Liability of Stockholders, sec. 330.

And yet the court is asked to hold that this thing, which the plaintiff sees fit to call a judgment, and which does not determine any amount due, but shows on its face that the true amount is not ascertained, shall be absolutely conclusive on the defendant here for the whole amount of the plaintiff's claim, without regard to the credits which should be given.

II.

The naked question is presented by the pleadings in this case, was the defendant a stockholder in that corporation?

Plaintiff claims that defendant was a stockholder because a certificate of stock was issued to the firm of J. & W.

Seligman & Co., absolute and unconditional on its face, and therefore, that defendant is estopped from denying that he held it in any other way than as owner, and that he cannot be permitted to show by evidence *aliunde*, that he really held it in trust, or as a pledge, or in "escrow." We submit that the decisions are so uniform to the contrary, that this can scarcely be now considered an open question.

McMahon v. Macey, 51 N. Y. 155–161.
Tonica and Petersburg R. R. Co. v. Stein, 21 Ills. 96–98.
Lathrop v. Kneeland, 46 Barb. 432–438.
Jones v. Portsmouth R, R. Co., 32 N. H. 544.

We could multiply authority upon authority to the same effect, but deem it unnecessary. In the case last cited, from 32 N. H., Judge Hale, who delivered the opinion in the case, says: "But without reference to the pledge, these shares were not the property of Hale and Jones. Though certificates of stock had been issued to them, yet it is evident, *upon an examination of all the writings upon this subject, which are to be construed together as one contract*, that these certificates were given up and surrendered to the corporation upon a special contract that the railroad should pay Hale and Jones the sum of $6,800, *either in these shares or in bonds*, which both parties contemplated the corportion would be authorized to issue, at the election of Hale and Jones."

Now how did Seligman hold this stock? The Circuit Court, in its finding of facts, says (p. 9 Record): "The "defendant or J. & W. Seligman & Co., never subscribed "for the stock, nor agreed to do so, and obtained the same "only in the *manner herein set forth*."

In what manner was that? Why, by virtue of the contract of March 14th, 1872, the resolution of the Board of Directors in pursuance of said contract, and the deposit of the mortgage bonds, the certificate of stock, and the certi-

fied copy of the resolutions of the board (see pp. 6, 7, 8, 9 and 10 of Record), all of which made one transaction or one contract. So that, whilst the certificate of stock taken by itself alone appeared to be unconditional and absolute on its face, yet, when taken as a part of all the contemporaneous writings in respect thereto, it was not absolutely or unconditionally issued to J. & W. Seligman & Co. The Circuit Court's finding is that it was so issued, and that the stock so issued and held, was the stock that was voted by the Seligmans in 1873 and 1874, and none other.

Counsel for plaintiff lays much stress on the fact that the certificate of stock issued to the Seligmans was unconditional on its face, and therefore, persons dealing with the corporation had a right to infer they held the stock as owners. I think this of no importance. The stock register or transfer book is the place to look to see who are stockholders. The certificates of stock issued are no part of the records of the corporation—they belong among the private papers of the individuals holding them for any purpose, and are not open to public inspection; but the stock register, where the transfers are registered, is the place for persons dealing with corporations to see who the members are.

Thompson on Liability of Stockholders, §§ 161–177.

And in this case the stock register shows that the Seligmans did not own the stock—that they held it "in escrow."

III.

But, says the plaintiff, if the Seligmans were not made absolutely stockholders by acceptance of the certificate of stock unconditional on its face, so that they never could disavow the same or dispute it, or show that they held it in some other way than as owners, still they subsequently made themselves liable as stockholders by estoppel, by vot-

ing the stock at two elections held by the stockholders of the corporation for the election of directors. That the effect of voting the stock was to entirely change the manner of their holding it. That that act did entirely away with the express contract in respect to it, and made an implied contract, by which they became absolute owners of the stock, and liable for the whole six million of dollars to the corporation. That whilst they and the corporation both understood that they held it as security, or in trust, under the contract, yet the legal effect of it was, instead of affording them security for the money they had loaned, they incurred an immense liability, enough to pay twenty times over, all the liabilities of the Company. And the decision of the Supreme Court of Missouri, in the case of Griswold v. Seligman, upon which the plaintiff relies here, goes to that extent. I shall hereafter comment upon that decision.

Admitting that the Seligmans had no right to vote the stock, did it change the character of their holding by illegally voting it? The corporation, or a court at the instance of any stockholder, would have prevented their voting the stock. They did not hold it in such manner as they could sell it. They could not draw dividends on it. They held it in no other manner than as stated in the finding of the Circuit Court.

Plaintiff says that there is something sacred about the capital stock of a corporation, that it is a trust fund held exclusively for the benefit of its creditors, that a corporation does not own its own stock, &c., &c., and he contends that there was something culpable, something savoring of fraud, in the transaction between the corporation and the Seligmans, by which the stock was given to them as it was and used by them as it was with the consent of the corporation. I deny that any such inference or conclusion can be justly made or held from the facts. It was a common every day business transaction, analagous to the cases of partnerships or individuals, who often surrender to the secured creditor the

absolute possession, control and management of their business, assets and property to the exclusion of the general creditors, until the secured are paid.

A corporation may own and issue, buy, hypothecate or sell its own stock:

See U. S. Trust Co. v. Harris, 2 Bosw. 75.
State Bank of Ohio v. Fox, 3 Blatchf, 431.
Robinson v. Beal, 26 Gea. p. 17.
Van Cott v. Van Braunt, (N. Y. Court of Appeals,) 82 N. Y., 535.

The Court there held that the corporation could pay out its stock at *any price*, even to the President of the corporation himself, for work done in building its road; and yet that he could not be made liable to a creditor for the difference between what he took the stock at and its face value.

But suppose the entire transaction with respect to the stock between the R. R.Co. and the Seligmans was illegal and invalid, then no liability could arise against them as stockholders:

Scovill v. Thayer, decided by this Court Oct., T., 1881. (14 Cent. L. J., p. 307.)

If the contract with the Seligmans was valid then they were not liable as stock holders by its terms, if invalid then the whole transaction was void.

Guest v. Worcester R. R. Co., *et. al.* 38 L. J. (Eng. C. P.) 23.

The *authorized* capital stock of a corporation is not a trust fund. It is no fund at all until subscribed for or sold, and then the proceeds become a fund, primarily for the benefit of the corporation, and secondarily a trust fund for the benefit of its creditors:

Brant v. Ehlin, Maryland Court of Appeals. 1882, 14 Cent. L. J., p. 449.

The Court says in that case:

"No one will pretend for a moment that in subscribing "to the stock of a corporation, the purpose is to create a "trust fund for creditors. On the contrary the object pri "marily is to furnish means to carry on its business, and to "share the profits, etc." And the Court goes on to discuss at length what is meant by the Court in declaring the capital stock a trust fund and what the limitation is.

IV.

But plaintiff invokes the principle of estoppel, and says that, because the Seligmans voted the stock which they could not legally do unless they were the owners, therefore they are estopped from now denying ownership and liability as such. In other words, if they did not own it, they voted it illegally, and, therefore, they at once became owners, and voted it legally. *Presto change*. This reasoning is very like the old epitome of Calvanism:

"If you've got religion, you do not know it,
"If you know it, you have not got it,
"If you've got it, you cannot loose it,
"If you loose it, you never had it."

Estoppel *in pais* consists in doings or sayings by one party by which he designedly induces another to alter, injuriously to himself, his previous condition. I submit the following well considered cases, which give the full extent of the doctrine:

Brown v. Wheeler, 17 Conn. 345.
Kinny v. Fainsworth, Ibid., 355.
Rangley v. Spring, 21 Maine, 130.
Canning v. Webster, 43 Ibid, 192.
Heath v. Deny Bank, 44 N. H. 174.

And the farthest plaintiff can claim the courts have gone is to construe the word "designedly," as a matter of law,

to mean that, if the acts are calculated to, and have actually misled the party acting upon them in good faith, the party guilty of such acts, will be legally chargeable with an intention of willful design.

Preston v. Mann, 25 Conn. 118.
Man. Bank v. Hogard, 30 N. Y. 226.

Now, in this case, what acts or saying of Seligman, within the rule, can plaintiff complain of? He made the contract for grading with the railroad company June 14, 1872, and the suit in which the judgment (so-called) was rendered, was for work done in fulfillment of that contract on his part. He made that contract with full knowledge of the provisions of the contract between the railroad company and the Seligmans of March 14, 1872. (See finding of facts, Record, p. 11.)

So he made his contract in the light of that knowledge, and his contract on its face bears this out. He saw that the mortgage covered all the property and earnings of the railroad company, and all its resources, except the municipal bonds, which had been and were to be voted to the company by townships in Missouri and Kansas, and he was, therefore, careful to have it provided in his contract with the company that he was to have those municipal bonds in payment for his grading; and he was so suspicious or apprehensive of the railroad company that he had it particularly specified that the company were not to get hold of the bonds at all, but that they were to be delivered to him directly by the agents of the municipalities voting the bonds, showing that he knew he had no other resource to look to for his pay.

The following is the provision in the contract with respect to his pay for grading &c. (Record, p. 15:)

"And the parties of the first part further agree that, in the payment for the said work and materials, in lieu of cash, they will take and receive at par the bonds of any of the towns, townships and counties of the States of Missouri

and Kansas through which the said railroad passes, bearing ten per cent. interest per annum, or the equivalent thereof in such bonds bearing a lower rate of interest issued duly according to law to the said party of the second; and the said party of the second part covenants and agrees to do and perform all the acts necessary to enable the parties of the first part to obtain any and all of said municipal bonds due them as soon as practicable by the compliance, on its part, with all the conditions under which said bonds were subscribed and pledged, and to appropriate such amount of them as may be required exclusively to the payment of the party of the first part, and not to sell or hypothecate them for any other purpose than such payment, excepting certain twenty thousand dollars of Mineral Township bonds in Jasper county, Mo., now in possession of said company, which said Mineral Township bonds the company shall be permitted to retain and use, accounting to said *Finn & Burgess* for the same by the delivery of a like amount of bonds hereafter to be obtained, bearing the same rate of interest (and the said party of the second part hereby authorizes and empowers the said party of the first part to ask, demand and receive any and all of said municipal bonds from the respective authorities to the extent of any and all estimates for work and materials done and furnished under this contract), that shall remain due and unpaid for the said receipt to be paid in behalf of the party of the second part, and applicable to the amounts due on this contract to the party of the first part."

How could the voting of the stock in 1873 and 1874, and the election of Joseph Seligman as a director in 1874, have any effect on him? His contract by which he bound himself to do the work was dated June 14th, 1872.

Take the plaintiff's own statement of his conversation with Seligman in June, 1872, before he made his contract for the grading, and it appears that he was then made aware that the municipal bonds were the only resources he had to look to for his pay. (See Rec. p. 11.)

V.

Plaintiff's counsel strenuously urge that because the corporation turned the road over to the trustees, and that one of the Seligmans was a trustee, and sold the road, etc., therefore they should be held liable as stockholders. But how does all that affect the issue in this case? This is not an action founded on any fraud, or alleged wrong doing of the Seligmans in wrecking the road. The issue here presents simply the legal question as to whether the defendant was a stockholder. But if those matters were material here what are the facts? The trustees did not take possession of the road until Oct., 1874, and the sale was not made until Jan. 1875, at which time there were five instalments of interest past due and unpaid, and the corporation totally insolvent. (See Rec. p. 13.) It had never paid a dollar of interest from the beginning, although it had commenced receiving advances from Seligmans under the contract of March 14th, 1872, as early as in May, 1872. The Seligmans were not original promoters of the corporation or scheme to build the road. They never had any relation to it until they were applied to to loan it money. They did loan it their money, and the only thing they did afterward was to try and collect it by means of the securities they had received. Yet Judge Sherwood, in his opinion in the Griswold case, says:

"They are plainly estopped as towards the corporation; and if towards the corporation, then this estoppel will enure to the benefit of the creditors of the corporation, who in this proceeding are subrogated to all its rights."

How could they be estopped, as to the corporation, when everything that was done, was either done with the consent of the corporation, or else in pursuance of a contract made with it? Besides, the act done, and the admission made, have none

of the elements of an estoppel, as it does not appear that any one has acted under it, or that any one would be injured by proving the true nature of the transaction.

I submit, that if the doctrine of estoppel would apply at all, it would apply as against the corporation and in favor of the Seligmans. Suppose the corporation had sued the Seligmans for the six millions, under these state of facts would not a court of justice say that it should be estopped from claiming that the Seligmans were stockholders? The corporation had borrowed their money on the security of the stock and bonds, had consented to its being voted, held as it was, had led the Seligmans into the trap, if trap it was, as plaintiff claims; refused to pay any interest on the money borrowed, but turned around and said, we owe you nothing, you owe us six millions, we have overreached you. In whose favor would the principle of estoppel apply in such case, in law, equity or morals? According to Judge Sherwood, it would apply in favor of the corporation and against the Seligmans. But, says the plaintiff, it was Seligman's board of directors that turned the road over to the trustees under the mortgage. What of it, the trustees were in duty bound to take, and the company was bound to give them possession in default in payment of interest under the mortgage; a court of equity would have placed them in possession summarily if the corporation had refused. So far as this case is concerned, at least, the board of directors are presumed to have acted fairly and honestly toward every interest, and we fail to see how the fact that they were elected by the vote of the Seligman stock, although it was illegally voted, can have any bearing on the question as to whether voting the stock changed their whole relation to the corporation. The corporation, or any member of it, might have prevented that stock from being voted if they had objected to it. The stock transfer book showed that they did not own the stock, but that they held it "in escrow."

VI

I contend, that entirely independent of the statute exempting persons from liability, holding stock as collateral security, or as trustees, etc., hereinafter considered, Seligman cannot be held liable in this case on the facts and merits generally. Take the whole range of cases cited by plaintiff's counsel on liability of stockholders, and there is not one of them broad enough to assert a liability on such a state of facts as exist here. In neither of those cases did the question arise as to the stock not being regularly subscribed for and issued stock, outstanding absolutely as a part of the subscribed capital stock of the company.

I think the courts in recent decisions have gone to the extreme as to the liability of stockholders, but we need not question their propriety or the extent to which they go, to shield the defendent from liability on the facts found in this case.

All the cases, from the case of Adderly v. Storm, 6 Hill. 624, down to Wheelock v. Kost, 77 Ill. 296, and the late cases in this court, where stockholders have been held liable, have rested entirely on the theory that the party holding the stock held the legal or equitable title to the same, accompanied by a beneficial interest, and that the stock was regularly issued outstanding stock of the company, the proceeds of which from some one must be made a resource of the corporation to pay its debt, and were all made *in the absence of a statute similar to ours.*

But I proceed to consider the statute, in the absence of which, admitting the liability of defendant, we claim his exemption here.

Section 9 of Art. II. of the chapter on corporations, relating to railroad companies, Wag. Stat., p. 301, provides as follows:

"§ 9. No person holding stock in any such company as executor, administrator, guardian or trustee, and no person holding such stock as collateral security, shall be personally subject to any liability as stockholder of such company, but the person pledging such stock shall be considered as holding the same, and shall be liable as a stockholder accordingly; and the estates and funds in the hands of the executor, administrator, guardian or trustee, shall be liable in like manner, and to the same extent, as the testator or intestate, or the ward or person interested in such fund would have been if he had been living and competent to act, and held the same stock in his own name."

It is significant that this statute was made to apply solely to the case of stock in railroad corporations; in regard to no other class of corporations in this State is there any such statute; seeming to indicate that the legislature had in view the notorious fact that railroad corporations were compelled to put out their stock as collateral, or in trust, just as was done in this case. It was the policy of the State to encourage the building of railroads, and whatever tended to retard or hinder railroad corporations in negotiating for money, such as liability of persons who might loan money on the stock as collateral, was to be avoided. Why else was this statute made applicable to stock in that class of corporations, and in no other?

But counsel for plaintiff contends that the exemption from liability provided in the first clauses of this section, is limited to cases where there is some one to respond to liability under the latter clauses of the same. They produce no authority for such construction, except the decision of a majority of a divided court in the case of Griswold v. Seligman, though this identical provision exists in the statutes of many of the States, and has so existed for twenty-five years in some of them.

The case of Johnson v. Laflin, decided by Judge Dillon, cited by plaintiff's counsel (6 Cent. L. J. 124), which is a case under the National Banking Act, does not assume to

construe the statute, but decides Britton's liability on the ground that his device was an illegal and fraudulent one, so far as attempting to make himself trustee was concerned, and, therefore, he held the stock in his own right. The stock in that case was genuine outstanding, regularly subscribed for and issued stock, and, of course, some one must be responsible for it. Besides, the statute is different (Rev. Stat. U. S. p. 995, § 5152); it has no provision in regard to persons holding stock as collateral security. None of the cases in regard to the stock of national banks are applicable, because, by section 5201 of the national banking law, such associations are expressly forbidden to be holders of their own shares, but there is no such prohibition in regard to the corporation in question.

In the case of Johnson v. Laflin, Judge Dillon says:

"Inasmuch as this act in express terms prohibits a national bank from becoming a purchaser of the shares of its own capital stock, if Laflin had made a contract to sell his shares to the bank, or to its president for the bank, it is plain that such a contract would have been *ultra vires* and illegal."

Plaintiff's counsel vehemently insists that that statute was only intended to apply in cases where the stock was pledged by some one who would stand responsible, and that corporations have no authority or right to put out or use their unsubscribed stock in that way; that they could do nothing in respect to the authorized, but unsubscribed stock, but issue it to subscribers who would become responsible for the whole face value of it, and that if they undertook to use it as collateral security, and do so use it, then the pledgee or trustee becomes liable as a stockholder, to the full amount of the stock so pledged or issued as collateral security, and is not protected by the statute.

In Mr. Thompson's work on Liability of Stockholders, sec. 224, he discusses this subject, and states that he has been able to find but two decisions strictly touching the

question, one English and the other American. The English case—

Guest v. Worcester R. R. Co. *et al*, 38 L. J. (C. P.) 23—

was decided on general principles without such a statute as ours, and is authority in principle in this case, either under this head or under a general consideration of the facts hereinbefore discussed. In that case, as in this, the shares were allotted to the persons sought to be charged as stockholders, and issued directly and absolutely to them *as paid up*, though, in fact, nothing was paid on them, and even in that case it was not entered on the registry, but in the call-book it was entered that they had been "deposited" as security for an overdrawn account, which is equivalent to a loan. The Court there decided that, if the issue of the stock in that way was invalid, the persons receiving the stock were not liable, because then the whole transaction was void, and no liability could arise from it. In other words, that the stock so issued being void it was not a part of the capital stock of the company, and hence there could be no liability to pay for it by the supposed holders, or to be responsible to the creditors of the corporation, to which liability they were sought to be held in that case; or if the contract and transaction was a valid one, then the defendants were not liable, *because the contract protected them*—just as we contend for here. Take either horn of the dilemma, and the defendant is equally exempt from liability.

Now, let me call attention to the American case, cited by Mr. Thompson, as the only other case to be found directly in point on the construction of this statute:

Mathews v. Albert *et al.*, 24 Md. 527.

The statute of Maryland, under which that decision was made, is a verbatim copy of our statute.

Maryland Code, p. 158, § 58.

The identical question raised by counsel for plaintiff here was raised and argued by counsel and decided by the Court in that case. It was a suit in equity wherein the rights and liabilities of several stockholders resting on different grounds were in issue—among others, one W. H. Tieman. He had loaned the corporation $2,000, and, as security for the money, a certificate of stock was issued to and accepted by him absolute on its face, though some time after a memorandum was endorsed on it by the president of the company that it had been "*deposited*" with Tieman as collateral security for the loan. The counsel argued, just as counsel argue here, that the statute did not apply to such a case where the company itself pledged the stock, but the Court decided the other way and we quote its language:

Goldsborough, J., delivering the opinion of the court:

"The claim of W. H. Tieman is for $2,000, money alleged to be loaned to the company on the 8th of Jan., 1859. But it is insisted by the appellees, that Tieman, instead of being a non-stockholding creditor, is, according to the evidence, a stockholder, and as much liable as the Alberts. We do not concur in this view of the relation of Tieman to the company. In our opinion, his claim is for money loaned; and the stock transferred to him *was held by him as collateral security for his loan, and so holding it, he is not personally subject to any liability as stockholder*, but is protected by the provision of the 12th section of the Act of 1852, ch. 338,"

Which is the same section referred to above in the Maryland Code, of which our statute is a literal copy—having been adopted at a later date in this State. In the entire absence of any contrary decisions, we think these two cases ought to be decisive. But counsel may contend that, inasmuch as there have been so few decisions immediately in point, that the question is novel, and that the facts are exceptional. Counsel urge that this was a new invention and device of the Seligmans to acquire all the rights of stockholders, with-

out incurring the liabilities. But it is not new. The same use of the nominal or unsubscribed stock of corporations has been of constant occurrence for many years, and the only argument to be drawn from the few decisions is, that there has been a general acquiescence by the bar in the view that when stock was issued and held in that way, the person so holding was not liable. Certainly, if any other view had prevailed, the cases must have been numerous that would have arisen.

It is contended that where the stock stands absolutely in the name of the person sought to be charged, in the books of the company, that as to creditors of the corporation such person must respond to the amount of the unpaid balance of the stock, no matter whether they were in fact stockholders in their own right or not; and it was so decided in a number of cases in New York to the fullest extent, until after the adoption in that State, in 1850, of the statute of which ours is a copy.

Banks' Rev. Stat. of N. Y., vol. 2, p. 671, sec. 11.

But since then the question has come squarely before the Court of Appeals, in the case of

McMahon v. Macey, 51 N. Y. 155,

where the court below (or the referree, we believe) had refused to receive evidence *aliunde* the books of the company, as to the stock being held as collateral, because in that case the transfer was absolute and unconditional to the defendant in the books of the company—(much stronger than the case at bar, for it did not so stand here but "in escrow")—and therefore, it was held that he could not show by parol that he held it as collateral. The Court of Appeals reversed the case, and decided that the defendant ought to be permitted to show by parol that he really held the stock as collateral security, and was exempt from liability under the statute. Now, how much stronger is the case

at bar? Here we do not depend merely on parol evidence, but the contemporaneous contracts in writing, and the entry on the stock register itself, and contemporaneous resolution of board of directors. And even the *condition* on which subscriptions were made, which were absolute on their face, have been permitted in many cases.

Tonica R. R. Co. v. Stein, 21 Ill. 96.

Pittsburgh & Conn. R. R. Co. v. Stewart, 41 Penn. Stat. 54.

And yet counsel say Seligman is bound by the stock certificate alone, unsupported by a like entry in the stock register, and that he cannot show the real facts by the other writings in regard to the same constituting a part of the whole transaction.

In Jones v. Portsmouth R. R. Co., 32 N. H. 544, it is decided that there is no difference between the contract of a stockholder and any other in regard to the principle that, "*all the writings upon the subject are to be construed together as one contract.*"

The case of McMahon v. Macey, 51 N. Y. (*ante*), shows that the highest court of that State have considered that the effect of that statute was to change the rule, both as to the liability of persons holding stock in pledge, or as collateral security, and as to the evidence that might be introduced to show how they held it.

Counsel say much about the inconsistency of the Seligmans having control of the corporation and not being members of it. Why should a corporation not have the right to give the control of the management of its affairs and property, for the time being to some trusted agent, who is helping to negotiate its securities and is making loans to it, just as a private individual has the right to do. Suppose a farmer mortgages his farm and all the stock on it, for money advanced, he can give up the possession, control and management of the same entirely to his mortgage creditor, or to

a trustee for his benefit. Nobody can question it. His unsecured creditors will be entitled, it is true, to what is left after the secured creditor is paid, but he cannot interfere with the control or management, which is part of the security of the secured creditor. Why should not a corporation, if it is an advantage to it and to all concerned to do so, have the same privilege?

Certainly there is nothing culpable or immoral in such a transaction, though Judge Sherwood seems to hold up his judicial hands with holy horror at the bare thought of such a thing.

After all, the Seligmans and the other bondholders of the corporation, or the trustees, in getting possession of the property, only accomplished by the consent of the board of directors just what they could have accomplished through a court of equity had the corporation refused to surrender possession to the trustees.

Of course, if there had been any fraud practiced by the trustees or the Seligmans in getting wrongful possession and control, or mismanagement and squandering, or misapplication of the assets or income of the property, after they got possession and control, to the injury of the corporation or its stockholders, or its creditors, a swift remedy could have been afforded by a court of equity at the instance of any such injured persons, had they been vigilant to assert their rights and interests.

Or if the Seligmans had been the original promoters and getters up of the scheme to build and own the railroad, and had organized the corporation for that purpose, using the names of puppets instead of their own as members of the corporation, and had the controlling stock issued to them in the manner this was issued, on the pretense that it was in trust or for collateral security, wanting good faith, not *bona fide*, such facts would present a very different case; and the trouble with the plaintiff here is that he seeks to have this case decided on such a supposed state of facts, which exist

in his imagination, but which the record not only does not sustain, but most clearly contradicts. But Oh! says the plaintiff, it would open the door for fraudulent operations of the same kind. Well, sufficient to the day is the evil thereof. Courts are generally able to get at the bottom facts of cases as they arise. Is it any objection to sustaining a valid mortgage or deed that if you do so, some scoundrel may make a fraudulent one?

But plaintiff's greatest reliance here is the decision of the Supreme Court of Missouri in the Griswold case. First he contends that that decision was the construction of a Missouri Statute and hence that it is binding on this court. But that is a misconception and a fallacy. The grounds on which Seligman was held liable was not any statutory provission at all. The court in that case put his liability on the general principles of law, (according to its feeble understanding) and did not place it on the ground of the construction of any Statute of the State. True it did attempt to construe the statute which the defendant set up as exempting him from liability, but construing that statute as it did, had no effect in determining affirmatively his liability as a stockholder. In that case there was no contention as to the construction of any statute under which he was to be held liable; so certainly that question is as open as any question could be so as far binding force goes. A very noticeable feature of the opinion of Justice Sherwood in the Griswold case is that it gives a wide berth to the facts of the case. The opinion is made up of abstract propositions and authorities not applicable and grossly misapplied, and hence the court kept in the back ground the facts of the case it was deciding. As to the construction given the statute exempting from liability persons holding stock in trust, etc., all I have to say is that that construction was a mere arbitrary dicta without precedent or authority and directly against plain authorities the other way, and the conclusion arrived at was by a process of the most fallacious and unsound reasoning.

neither justified by law, logic, grammer or good sense. But was that the construction of a "local statute" of the State of Missouri, within the meaning of the decisions of this court, that it will follow the decisions of the State courts in construing such statutes? Certainly not. The statute itself is only a re-enactment of the principles of common law and equity. It is a statute copied from another State, whose highest court has given a different construction to it. Judge Sherwood, in the Griswold case, says that the decision of the court in the Maryland case was made without authority, and without giving at length the reasoning of the court in coming to the conclusion it did. But Judge Sherwood's own decision was made against authority, and entirely without precedent, and his reasoning (?) is certainly worse than no reasoning at all, for it is monstrously fallacious.

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